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**Dilling Mechanical Contractors, Inc. and Indiana State Pipe Trades Association, United Association of Plumbers and Pipefitters, AFL-CIO, and Plumbers and Steamfitters Local Union No. 166, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada**

**Dilling Mechanical Contractors, Inc. and Tradesmen International, Inc., Joint Employers and Indiana State Pipe Trades Association, United Association of Plumbers and Pipefitters, AFL-CIO, and Plumbers and Steamfitters Local Union No. 166, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada.** Cases 25-CA-23973, 25-CA-24149, 25-CA-24600-2, 25-CA-24600-4, 25-CA-24600-5, Cases 25-CA-25531-1, and 25-CA-25531-2

September 15, 2006

**DECISION AND ORDER**

BY CHAIRMAN BATTISTA AND MEMBERS SCHAMBER  
AND KIRSANOW

On August 18, 2000, Administrative Law Judge Robert M. Schwarzbart issued the attached decision. Respondent Dilling Mechanical Contractors, Inc. (DMC) and Respondent Tradesmen International, Inc. (TI) separately filed exceptions and supporting briefs. The General Counsel filed an answering brief, to which both Respondents separately filed reply briefs. The General Counsel also filed exceptions and a supporting brief, to which both Respondents separately filed answering briefs. The General Counsel also filed a reply brief.<sup>1</sup>

<sup>1</sup> There are no exceptions to the judge's findings that DMC violated Sec. 8(a)(1) by confiscating union literature from Jeff Smith and Stan Bristow and making threats of unspecified reprisals in February 1995; creating an impression of surveillance in March 1996; sending Kevin Sexton home to change to clothing that did not bear union insignia in March 1996; and interrogating employees James Hankins and Thomas Hankins in March 1997.

Similarly, there are no exceptions to the judge's recommended dismissals of the allegations that DMC violated Sec. 8(a)(1) by interrogating Steven Jacob about the Union and threatening discharge during his interview in April 1995; telling employees that it would be futile to select the Union as their bargaining representative in April 1995; interrogating employees at one of its jobsites in June 1995; interrogating Jeff Smith in the early spring of 1996; and telling employees that DMC did not want to hire union members in June 1997. There are also no exceptions to the judge's recommended dismissal of the allegations that

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions and to adopt the judge's recommended Order as modified and set forth in full below.<sup>3</sup>

TI violated Sec. 8(a)(3), (4), and (1) by refusing to hire or refer Jacob in August 1997.

<sup>2</sup> DMC and the General Counsel excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

DMC excepted to the judge's finding that it discriminatorily discharged Steven Jacob on May 15, 1995. We find no merit in DMC's exceptions, and we adopt the judge's finding that DMC violated Sec. 8(a)(3) and (1) by discharging Jacob for the reasons set forth in his decision. Regarding the judge's *Wright Line* analysis, Member Schaumber observes that the Board and circuit courts of appeals have variously described the evidentiary elements of the General Counsel's initial burden of proof under *Wright Line*, sometimes adding as an independent fourth element the necessity for there to be a causal nexus between the union animus and the adverse employment action. See, e.g., *American Gardens Management Co.*, 338 NLRB 644, 645 (2002). As stated in *Shearer's Foods*, 340 NLRB 1093, 1094 fn. 4 (2003), since *Wright Line* is a causation analysis, Member Schaumber agrees with this addition to the formulation. Member Schaumber additionally observes that DMC did not except to the judge's finding that the General Counsel satisfied his initial burden under *Wright Line* with regard to Jacob's discharge. In the absence of such exception, Member Schaumber agrees with the judge and his colleagues that DMC violated Sec. 8(a)(3) by discharging Jacob.

The General Counsel excepted to the judge's recommended dismissal of allegations that DMC violated Sec. 8(a)(3) and (1) by suspending Kevin Sexton on March 22, 1996, discharging Randall Collins on April 1, 1996, and laying off Courtney Wheeler on May 19, 1995. The General Counsel also excepted to the judge's recommended dismissal of the allegation that TI violated Sec. 8(a)(1) by telling DMC's employees on June 27, 1997 that DMC was using TI to avoid hiring union-affiliated applicants. We find no merit in the General Counsel's exceptions, and we dismiss these allegations for the reasons set forth in the judge's decision.

<sup>3</sup> We shall amend the judge's Conclusions of Law to conform them to the violations found. We shall also modify the judge's recommended Order to conform it to the violations found and to the Board's standard remedial language, and in accordance with our decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001). In addition, considering that we dismiss many of the complaint allegations at issue in this case, we do not believe that a broad cease-and-desist order is warranted under the test set forth in *Hickmott Foods*, 242 NLRB 1357 (1979), and we shall modify the judge's recommended Order accordingly. See, e.g., *Norton Audubon Hospital*, 341 NLRB 143 fn. 2 (2004); *Dayton Newspapers, Inc.*, 339 NLRB 650 fn. 2 (2003). Member Schaumber notes that, in the circumstances of this case, a narrow cease-and-desist order is consistent with the views he expressed in *Postal Service*, 345 NLRB No. 25, slip op. at 4-7 (2005).

We shall also substitute a new notice in conformity with the Order as modified and in accordance with our decision in *Ishikawa Gasket*

## I. INTRODUCTION

The General Counsel filed the first consolidated complaint in this case on December 17, 1996. That complaint alleged, among other things, that DMC violated Section 8(a)(3) and (1) by refusing to consider for hire and refusing to hire 25 union-affiliated workers who applied for work with DMC on May 26, 1995. The parties privately settled the allegations in the first complaint on May 20, 1997. Shortly thereafter, DMC breached that settlement agreement.<sup>4</sup>

The General Counsel filed a second consolidated complaint on December 4, 1997. That complaint alleged, among other things, that DMC violated Section 8(a)(1) by entering into the non-Board settlement agreement with no intention of honoring its terms and by later breaching that agreement. The second complaint also alleged that DMC violated Section 8(a)(3) and (1) by refusing to consider for hire and refusing to hire 11 union-affiliated workers who applied for work with DMC in April 1997.

The judge found that DMC unlawfully refused to consider the May 1995 and April 1997 applicants for hire but did not unlawfully refuse to hire them. For the reasons discussed more fully below, we disagree with the judge's findings of refusal-to-consider violations, but adopt, for the reasons set forth in his decision, the judge's finding that DMC did not unlawfully refuse to hire the May 1995 applicants. We also affirm, on a rationale different from that set forth in his decision, the judge's finding that DMC did not unlawfully refuse to hire the April 1997 applicants.

The judge also found that, because the General Counsel materially breached his obligations in the non-Board settlement agreement, the General Counsel was estopped from alleging in the second complaint that DMC violated Section 8(a)(1) by entering into that settlement agreement with no intention of honoring its terms and by breaching the agreement. We disagree and reverse the

judge's estoppel finding. On the merits of these allegations, we find that DMC's conduct concerning the settlement agreement violated Section 8(a)(1) as alleged for the reasons discussed below.

The judge additionally found that DMC and TI, as joint employers, unlawfully refused to hire 23 union-affiliated workers who applied for work with DMC in June 1997 pursuant to the non-Board settlement agreement. Neither the first nor the second complaint alleged that DMC's or TI's June 1997 hiring practices violated Section 8(a)(3). For the reasons discussed below, we reverse this unalleged violation.

## II. FACTS

From 1980 until January 1998, DMC was an electrical, mechanical, and general contractor for commercial construction work and, until July 1997, directly employed electrical and mechanical trades workers. From at least 1990, DMC consistently adhered to two hiring policies relevant to the issues here: (1) a preference for hiring exclusively from a pool of workers referred to DMC by individuals DMC knew and could contact for references (the referral policy); and (2) a policy of accepting applications from nonreferred individuals, in the event there was a need for supplemental hires, but discarding those applications after 7 days (the application retention policy).<sup>5</sup> These policies were widely disseminated among DMC hiring officials, and the application retention policy was printed on every DMC application and posted in DMC's offices. Union officials were also aware of DMC's hiring policies. The record does not show that DMC deviated from these two hiring policies during the timeframe of this case.

There was an attempt to organize DMC's mechanical trades employees in 1992, but that campaign was unsuccessful.<sup>6</sup> As part of a renewed effort to organize at DMC, union organizers Paul Long and Malcolm Zimmer went to DMC's office on April 25, 1995, so that Zimmer could apply for work. Zimmer asked DMC's receptionist if DMC was hiring and, according to Zimmer, she said yes.<sup>7</sup> Zimmer left with a blank application form, and Long subsequently distributed copies of the form to other union members and solicited them to apply for work at

*America, Inc.*, 337 NLRB 175 (2001), enf'd. 354 F.3d 534 (6th Cir. 2004).

DMC requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

<sup>4</sup> As discussed more fully below, on February 23, 1998, the judge vacated the parties' non-Board settlement agreement and reinstated the underlying unfair labor practice allegations against DMC. No party sought special permission to appeal the judge's order or argued in their exceptions that vacating the settlement agreement was improper. In the absence of such exception, we find the judge acted properly in this regard. Cf. *Nations Rent, Inc.*, 339 NLRB 830, 831 (2003) (reaffirming Board's longstanding position that a settlement agreement may be set aside and unfair labor practices found based on presettlement conduct if there has been a failure to comply with the provisions of the settlement agreement).

<sup>5</sup> There was no allegation that DMC's referral or application retention policies were unlawful.

<sup>6</sup> The organizing activities in 1992 were primarily conducted by the International Brotherhood of Electrical Workers, Local No. 668. During that campaign, DMC committed numerous unfair labor practice violations, primarily 8(a)(1) violations but several 8(a)(3) violations as well. *Dilling Mechanical Contractors, Inc.*, 318 NLRB 1140 (1995), enf'd. 107 F.3d 521 (7th Cir. 1997).

<sup>7</sup> Long testified slightly differently. According to Long, Zimmer asked DMC's receptionist if DMC was accepting applications, and she said yes. DMC's receptionist did not testify.

DMC. Long and Zimmer received 24 applications from union members and submitted them, along with Zimmer's application, to DMC on May 26, 1995. Long called each of the applicants twice in June 1995 and discovered that DMC had not contacted any of them. DMC did not hire any employees from any source during the May - June 1995 timeframe.

Sometime in 1996, DMC decided to change the scope of its business from electrical and mechanical subcontracting to project management and general contracting. As part of this transition, DMC planned to discontinue using its own mechanical trades employees, replacing them with leased workers. DMC's owner Richard "Dick" Dilling testified that utilizing leased workers would improve DMC's profitability and reduce its administrative burdens.<sup>8</sup> After making this decision, DMC experimented with several employee leasing companies, including TI. In October 1996, DMC and TI entered a trial contract. TI agreed to supply DMC with all the mechanical trades workers needed at DMC's jobsites in exchange for a negotiated fee for each worker. In the trial contract, TI was not designated as DMC's sole source for mechanical trades employees at DMC jobsites. DMC continued to utilize TI employees under the trial contract until May 19, 1997.<sup>9</sup>

On four separate occasions in April, union organizer Jeff Jehl submitted 11 union members' applications to DMC. During his first visit to DMC's office, Jehl noticed DMC's application retention policy printed on the applications. In recognition of that policy, Jehl submitted applications to DMC every 6 days: on April 4, April 10, April 16, and April 22. DMC never contacted any of these applicants to offer them work. On April 28, however, DMC hired James and Thomas Hankins, both of whom were union-affiliated workers referred to DMC.<sup>10</sup>

On May 19, DMC and TI executed a second agreement wherein DMC agreed to discharge all of its current mechanical trades employees at all of its jobsites and TI agreed to simultaneously offer them employment. TI then referred those employees it hired to DMC at the same DMC jobsites where they previously worked. TI also agreed to offer positions to former DMC employees who were either then unemployed or had been recently laid off and to refer those employees for work at future DMC jobsites. By this contract, DMC no longer directly

employed mechanical trades workers and instead utilized TI as its exclusive source for those workers.<sup>11</sup>

On May 20, the Union and DMC privately settled the complaint allegations that DMC had, among other things, unlawfully refused to hire or consider for hire the May 1995 applicants. In the settlement, DMC promised to utilize a preferential hiring list naming the May 1995 applicants who resubmitted applications to DMC (the settlement list). DMC agreed to hire one person from the settlement list for every person that it hired from a second list containing names of individuals recently referred to DMC (the referral list). DMC agreed to use these two lists for 9 months. DMC also agreed to submit a lump sum check for \$35,000 to the Region's compliance officer for distribution to the alleged discriminatees. During the settlement conference, the General Counsel requested clarification concerning distribution of the settlement funds because he was not a party to the non-Board agreement between DMC and the Union. After some off-the-record discussions, DMC and the Union, with the General Counsel's acquiescence, agreed that the Region's compliance officer would accept the funds and distribute them to the alleged discriminatees after consultation with the Union. In exchange for DMC's promises, the Union withdrew the unfair labor practice charges underlying the first complaint.

On June 2, DMC and TI executed a third contract reaffirming their May 19 agreement that TI was the exclusive source of mechanical trades workers for all of DMC's jobsites (the DMC-TI agreement). Although TI was unaware of the May 20 settlement agreement, DMC partially incorporated its obligations under that agreement into the DMC-TI agreement by directing TI to utilize the settlement list, i.e., the preferential hiring list of May 1995 applicants who resubmitted applications.<sup>12</sup> The DMC-TI agreement, however, effectively lowered the hiring priority of the individuals named on the settlement list by requiring that TI contact those individuals only after (1) TI had offered work to all active DMC employees laid off as a result of DMC's transition from a direct employer of mechanical workers; (2) TI had offered positions to former DMC employees who were either then unemployed or had been recently laid off; and (3) TI had satisfied its hiring obligations to other customers and yet still needed workers. The DMC-TI agreement also required TI to utilize the settlement and

<sup>8</sup> There was no allegation that DMC's decision to reorganize in this manner was unlawful.

<sup>9</sup> All subsequent dates refer to 1997 unless otherwise indicated.

<sup>10</sup> As noted above, there are no exceptions to the judge's finding that DMC coercively interrogated the Hankins's after hiring them. There is also no evidence that DMC knew they were union members when it hired them.

<sup>11</sup> There were no complaint allegations that DMC's contractual relationship with TI, its motivation for contracting with TI, or its hiring practices after April 1997 were unlawful.

<sup>12</sup> TI Account Manager Mike Morris credibly testified that he did not become aware that DMC had shifted its settlement agreement obligations to TI until sometime in March 1998.

referral lists for only 6 months, rather than the 9 months called for in the settlement agreement.

Sometime in early June, union organizer Long mailed to DMC applications from 23 of the 25 union members who had applied to DMC in May 1995. On June 16, DMC sent a lump sum check for \$35,000 to the Region's compliance officer. By late June or early July, DMC had laid off all of its active mechanical trades employees and TI had simultaneously offered them work at DMC's jobsites. TI hired most, but not all, of DMC's active work force, including numerous employees it knew to be union-affiliated. After this transition, DMC exclusively used TI employees to perform the mechanical trades work previously done by its own employees.

The Region never distributed the \$35,000 lump sum submitted by DMC. Since early July, DMC has not directly hired any mechanical trades employees, and neither DMC nor TI has contacted any of the individuals on the settlement list with offers of employment. TI did hire one individual from the referral list sometime in November.

In an order dated February 23, 1998, the judge set aside the non-Board settlement agreement, finding that DMC had not complied with its terms by utilizing a hiring process different than the one set out in the settlement agreement. The judge also reinstated the settled complaint allegations and consolidated them with additional allegations, including allegations that DMC had unlawfully refused to hire or consider for hire the April 1997 applicants, entered into the settlement agreement with no intention of complying with its terms, and breached that agreement. In his February 23, 1998 order, the judge also questioned, *sua sponte*, whether the General Counsel was estopped from complaining that DMC's breach of the settlement agreement violated Section 8(a)(1) where the General Counsel also had allegedly materially breached the settlement agreement by failing to distribute the settlement funds as required.

### III. DISCUSSION

#### A. DMC's Hiring Practices in May 1995 and April 1997

The complaint alleged that DMC refused to consider for hire and refused to hire the May 1995 and April 1997 applicants because of their union membership, thereby violating Section 8(a)(3)'s prohibition against hiring discrimination. In *FES*, the Board set forth its analytical framework for determining whether an employer violated Section 8(a)(3) by failing or refusing to consider or hire job applicants because of their union activities or affiliation. 331 NLRB 9 (2000), *enfd.* 301 F.3d 83 (3d Cir. 2002). Regarding discriminatory refusals to consider for hire, the Board stated:

[T]he General Counsel bears the burden of showing the following at the hearing on the merits: (1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment. Once this is established, the burden will shift to the respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation.

If the respondent fails to meet its burden, then a violation of Section 8(a)(3) is established.

*Id.* at 15. The Board further held with respect to discriminatory refusals to hire:

[T]he General Counsel must, under the allocation of burdens set forth in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), first show the following at the hearing on the merits: (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to . . . the positions for hire . . . ; and (3) that antiunion animus contributed to the decision not to hire the applicants. Once this is established, the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation. . . .

If the General Counsel meets his burden and the respondent fails to show that it would have made the same hiring decisions even in the absence of union activity or affiliation, then a violation of Section 8(a)(3) has been established.

*Id.* at 12.

#### 1. Refusal-to-consider allegations

The judge found that DMC "used its policy of accepting job applications, of storing them for seven days and of discarding them in favor of referrals from known sources as a means of screening applicants to ensure that they were not union adherents."<sup>13</sup> The judge also rejected DMC's assertion that it had not received these applications.<sup>14</sup> As a result, the judge found that DMC violated Section 8(a)(3) by refusing to consider the May 1995 and April 1997 applicants for hire. For the following reasons we disagree.

<sup>13</sup> The judge acknowledged that DMC's hiring policies were not *per se* unlawful.

<sup>14</sup> At the hearing, Dilling testified that DMC never received these applications. The judge, however, discredited that testimony, and there is no exception to the judge's finding that DMC had received the applications.

First, the General Counsel did not allege in either complaint that DMC's hiring policies were unlawful. Second, the record does not show any deviations from DMC's hiring policies during the relevant timeframe. *Zurn/N.E.P.C.O.*, 345 NLRB No. 1, slip op. at 5–6, 8–9 (2005) (finding that employer's facially neutral hiring policy was lawful where employer did not deviate from policy but unlawful where policy was not followed). Third, the record fails to show that DMC disparately applied those policies in a manner that operated to exclude union-affiliated employees. Cf. *Fluor Daniel, Inc.*, 311 NLRB 498 (1993), enf'd. in part, remanded in part 161 F.3d 953 (6th Cir. 1998) (adopting judge's finding that employer's application retention policy was unlawful because of employer's disparate enforcement of policy). In fact, the referral policy actually resulted in DMC hiring numerous openly prounion workers, thus undercutting the judge's finding that DMC used the policies to screen out union adherents. Finally, the record affirmatively demonstrates that the policies were adopted long before the Union's organizational campaigns and that union officials were well aware of DMC's policies when they submitted applications to DMC.<sup>15</sup> Thus, it is clear that the policies were not adopted in response to the Union's organizational efforts.<sup>16</sup>

The record establishes that DMC's hiring decisions were “based on neutral hiring policies, uniformly applied.” *Ken Maddox Heating & Air Conditioning*, 340 NLRB 43, 44 (2003) (quoting *Sunland Construction Co.*, 309 NLRB 1224, 1229 fn. 33 (1992)). The Board has previously found policies like DMC's, which do not differentiate among applicants along Section 7 lines or on the basis of union-related considerations, to be lawful.<sup>17</sup> DMC was entitled to rely on its hiring policies in deciding which applicants to consider for hire. *Tambe Electric, Inc.*, 346 NLRB No. 39, slip op. at 3 (2006). Under those policies, DMC satisfied all of its hiring needs during this timeframe through the referral pool and never had to turn to the applicant pool to obtain workers. There is, accordingly, no basis for concluding that the May 1995 and April 1997 applicants were excluded from DMC's hiring

process. We shall therefore dismiss the refusal-to-consider allegations concerning the May 1995 and April 1997 applicants. *Zurn/N.E.P.C.O.*, supra, slip op. at 10.

## 2. Refusal-to-hire allegations

### a. May 1995 applicants

The judge found that DMC did not unlawfully refuse to hire the May 1995 applicants. He found that “the General Counsel did not establish that DMC had been actively hiring new workers when the applications were delivered to DMC.” The General Counsel excepted to this finding, arguing that DMC's receptionist's hearsay statement that DMC was hiring was sufficient to establish that DMC was hiring or had concrete plans to hire at the time the union organizers submitted applications to DMC. We find no merit in the General Counsel's exception and agree with the judge that, for the reasons set forth in his decision, the General Counsel failed to meet his initial *FES* burden for a refusal-to-hire violation concerning the May 1995 applications.<sup>18</sup>

### b. April 1997 applicants

The judge implicitly found that DMC did not unlawfully refuse to hire the April 1997 applicants. According to the judge, the General Counsel did not establish that DMC had been hiring new employees when union organizer Jehl submitted the applications to DMC. In his exceptions to this finding, however, the General Counsel argued that DMC hired two new employees during the same timeframe of Jehl's submission of applications to DMC. We agree with General Counsel on this point. The record shows that DMC hired employees James and Thomas Hankins on or about April 28, within the 7-day retention period for the last round of applications that Jehl submitted to DMC on April 22. Thus, the judge

<sup>15</sup> We do not find, however, that all these circumstances must necessarily be present in order to find lawful an employer's hiring policy.

<sup>16</sup> Consequently, *Ultrasystems Western Constructors*, 310 NLRB 545, 554 (1993), enf. denied 18 F.3d 251 (4th Cir. 1994), relied on by the judge, is distinguishable.

<sup>17</sup> See *Ken Maddox Heating & Air Conditioning*, supra at 44 fn. 4 (citing cases); *Kanawha Stone Co.*, 334 NLRB 235, 236–237 (2001) (finding employer's preference for hiring “former employees, relatives of employees, or referrals by employees” lawful); *Irwin Industries, Inc.*, 325 NLRB 796, 798 (1998) (finding employer's policy of hiring on basis of referrals, prior work experience with employer, or continued and persistent efforts to obtain work after submitting application lawful).

<sup>18</sup> During the hearing, the General Counsel asked union organizer Zimmer about the circumstances surrounding his first visit to DMC's offices in April 1995. Zimmer testified that he asked DMC's receptionist if DMC was hiring and she said yes. DMC immediately objected to Zimmer's testimony, arguing that his testimony was hearsay. The General Counsel responded that the receptionist's hearsay statement was not being offered for the truth of the matter asserted (i.e., that DMC was hiring), but rather was merely part of the narrative concerning the union organizers' conduct in submitting applications to DMC. On the basis of that representation, the judge overruled DMC's hearsay objection and accepted the testimony.

In his brief in support of exceptions, however, the General Counsel argued that the receptionist's hearsay statement was evidence that DMC was hiring or had concrete plans to hire at the time the applications were submitted (i.e., that the receptionist's hearsay statement was true). We reject the General Counsel's contention because of his representation at the hearing that the receptionist's hearsay statement was not being offered for the truth of the matter asserted. In any event, this hearsay statement, standing alone, is insufficient proof that the Respondent was hiring or had concrete plans to hire.

erred by finding that DMC was not hiring at the time of the alleged unlawful conduct.

Even assuming that the General Counsel met his initial *FES* burden, however, we nevertheless find that DMC did not violate Section 8(a)(3) by not hiring the April applicants. James and Thomas Hankins, both union members, were entitled to hiring preference under DMC's lawful referral policy described above. None of the April applicants qualified as "referrals" under that policy. As we have found, that policy was a legitimate employment practice, and there was no evidence of any disparate treatment or deviation from it. Thus, DMC established that it would not have hired the April 1997 applicants even in the absence of their union affiliation. *Tambe Electric, Inc.*, supra, slip op. at 4; *Zurn/N.E.P.C.O.*, supra, slip op. at 5.

### B. The May 1997 Non-Board Settlement Agreement

#### 1. Estoppel

In his prehearing order vacating the May 1997 non-Board settlement agreement, the judge hypothesized that the General Counsel's failure to distribute the settlement funds was "a significant factor in the deterioration of the May 20 settlement and the need for further proceedings." Thereafter, the judge, sua sponte, raised the question of whether the General Counsel should be estopped from alleging that DMC's conduct with regard to the settlement agreement violated Section 8(a)(1).

The judge again raised the issue of estoppel during the hearing. The General Counsel argued to the judge that he was not a party to the non-Board settlement agreement, even though he participated in settlement discussions and in the settlement conference, and that he had not undertaken any promises in the settlement agreement. DMC's attorney, though present, did not participate in this discussion. The judge raised the estoppel issue for a third time near the close of the General Counsel's case-in-chief, and the General Counsel reiterated his earlier position. DMC's attorney made some clarifying remarks during this exchange but did not otherwise argue for an application of estoppel against the General Counsel, and DMC did not argue estoppel in its posthearing brief to the judge.

The judge nonetheless found that, due to the General Counsel's postsettlement failure to distribute the settlement funds, the General Counsel was estopped from alleging that DMC had violated Section 8(a)(1) by entering into the settlement agreement with no intention of complying with its terms and by breaching the agreement. The judge accordingly recommended dismissing those

complaint allegations.<sup>19</sup> The General Counsel excepted to this finding, and we find merit in those exceptions.

The General Counsel was not a party to the non-Board settlement agreement, was not obliged to undertake any action thereunder, and therefore could not breach the agreement, even though he was involved in the settlement discussions between the parties. Cf. *Auto Bus*, 293 NLRB 855, 856 (1989) (finding General Counsel not estopped by non-Board settlement agreement, even where Board agent involved in informal settlement discussions); *Gladstones 4 Fish*, 282 NLRB 1285, 1287 (1987) (finding General Counsel not foreclosed from seeking a specific kind of remedy by virtue of assurances made by General Counsel in the course of discussions over a non-Board settlement of underlying unfair labor practice allegations). The General Counsel therefore was not estopped from litigating the allegations that DMC violated Section 8(a)(1) by its conduct upon entering the non-Board settlement agreement and by its postsettlement conduct, and we reverse the judge's estoppel finding. See also *Wallace Corp. v. NLRB*, 323 U.S. 248, 253–255 (1944) ("We cannot, by incorporating the judicial conception of estoppel into its procedures, render the Board powerless to prevent an obvious frustration of the Act's purposes"; approving Board's practice of going behind settlement agreement where it failed to accomplish its purpose or where there was a subsequent unfair labor practice).

#### 2. Settlement agreement allegations

Turning to the merits, we find that DMC's conduct in entering into and subsequently breaching the settlement agreement violated Section 8(a)(1) under the circumstances of this case.<sup>20</sup> By entering the settlement agreement, DMC promised to use the hiring procedure set out therein, which in turn induced the Union to withdraw the underlying unfair labor practice charges. DMC, however,

<sup>19</sup> The case relied on by the judge, *J.R. Simplot*, 311 NLRB 572, 574 (1993), enfd. 33 F.3d 58 (9th Cir. 1994), is inapposite. There, with Board approval, the judge found that the General Counsel's precomplaint conduct, which suggested that the General Counsel would not urge deferral to an arbitrator's award, estopped the General Counsel from later urging deferral to that award. In contrast to the judge's decision here, the judge in *J.R. Simplot* did not preclude the General Counsel from litigating an unfair labor practice allegation but rather precluded the General Counsel from changing his position on the deference owed to the arbitrator's award.

<sup>20</sup> Para. 5(b) of the second complaint alleged, in relevant part, that DMC "entered into a settlement agreement with the Union . . . with no intent of honoring the terms of that settlement and for the purpose of evading its liability under the Act, and since that date, [DMC] has deliberately violated that settlement with the purpose of frustrating the remedial functions of the Act and the Board." The complaint did not allege that DMC's breach of the settlement agreement violated Sec. 8(a)(3).

knew at the time it made that promise that it was already contractually committed to use TI for all of its hiring needs, indicating that DMC's settlement agreement promise was illusory. After the settlement agreement, DMC also actively engaged in conduct that undermined its settlement agreement promise by directing TI to use a hiring procedure that deprived the May 1995 applicants of their preferential hiring rights under the settlement agreement. This specific conduct, which the General Counsel litigated as a breach of the settlement agreement, effectively placed the individuals named in the settlement list at a disadvantage in DMC's procedure for obtaining mechanical trades workers at its job sites by reducing the hiring priority of those individuals and by reducing the amount of time that TI was required to use the procedure set out in the DMC-TI agreement to meet DMC's hiring needs.<sup>21</sup>

As the Board has observed, settlements are an integral part of the Board's processes for resolving unfair labor practice complaint allegations, and they play an indispensable role in implementing national labor policy. *Norris Concrete*, 282 NLRB 289, 291 (1986). Non-Board settlements are often the only means available to avoid time-consuming and expensive litigation of unfair labor practice cases. Hence, "[t]heir viability must not be endangered by allowing respondents who fraudulently enter into such agreements to benefit from their misconduct." *Id.* at 291.<sup>22</sup> Furthermore, a critical part of the settlement agreement was the Union's withdrawal of unfair labor practice charges. The filing of a charge is the sine qua non to initiation of the Board's investigatory and prosecutorial powers under Section 10 of the Act. The Board has consistently found conduct by employers that interferes with its processes violates Section 8(a)(1).<sup>23</sup> "Not only does the Board have the authority to protect employees who participate in the Board's processes, but it has been held that the Board has an affirma-

tive duty to exercise that authority to its outermost limits to protect such employees."<sup>24</sup> The fraudulent inducement of the withdrawal of a charge, while perhaps more subtle, is no less an interference with the Board's processes than overt attempts to pressure an employee to withdraw unfair labor practice charges.<sup>25</sup>

Absent DMC's illusory settlement promises and its actions specifically aimed at avoiding fulfilling those promises, the May 1995 union-affiliated applicants would have had a timely determination of their hiring discrimination claims and, if justified, a Board order remedying any unfair labor practices found.<sup>26</sup> We find that DMC, by its conduct described above, unlawfully interfered with, restrained, or coerced employees in the exercise of their Section 7 rights and undermined the Board's processes. Accordingly, we find that DMC violated Section 8(a)(1) as alleged.

### C. DMC's and TI's Hiring Practices in June 1997

Neither complaint specifically alleged an 8(a)(3) violation as to DMC's hiring practices in June 1997, nor did the General Counsel amend either complaint to include such an allegation before, during, or after the hearing. The first complaint did allege, however, that "since May 26, 1995, and continuing to date, [DMC] has refused to hire or consider for hire" 25 union-affiliated applicants in violation of Section 8(a)(3). As discussed above, the second complaint alleged that DMC violated Section 8(a)(1) by entering into the settlement agreement with no intent of honoring its terms and by thereafter deliberately breaching the agreement.

The judge acknowledged that neither complaint specifically alleged an 8(a)(3) violation as to DMC's June 1997 conduct. Nevertheless, the judge found that the "continuing to date" language in the first complaint was sufficient to call DMC's hiring practices in June 1997 into question: "DMC's continuing refusal to hire any of these workers when they reapplied in 1997, literally at DMC's invitation, gave currency to the [first complaint's] allegation that the there-alleged discriminatory

<sup>21</sup> The judge appears to have relied on DMC's decision to use TI as its exclusive source of mechanical trades workers and Dilling's formation of Dilling Mechanical, Inc. (DMI) in September 1998 as additional bases for finding that DMC breached the settlement agreement. We do not rely on these additional bases and rely only on the fact that DMC directed TI to use a hiring procedure different from the one set out in the settlement agreement. In this regard, we note that the judge found that DMC had stated a legitimate business reason for using TI as its exclusive source for mechanical trades employees, and the General Counsel did not except to that finding.

<sup>22</sup> The General Counsel in *Norris Concrete* did not allege the fraudulent inducement of a settlement agreement as an independent violation of Sec. 8(a)(1). However, the Board's reasoning in that case stands as strong support for finding such a violation where, as here, it has been alleged.

<sup>23</sup> E.g., *Alfa Leisure Inc.*, 251 NLRB 691, 704 and cases cited therein (1980) (the Chester Robinson offer); *East Texas Pulp & Paper Co.*, 143 NLRB 427, 446 (1963).

<sup>24</sup> *Operating Engineers Local 138 (Charles S. Skura)*, 148 NLRB 679, 681 (1964) (finding union violated Sec. 8(b)(1)(A) by fining employee member for filing unfair labor practice charges).

<sup>25</sup> "Attempted interference with the Board's prosecutory process is itself, without more, substantial and serious, striking at the Board's capability to 'keep[ ] open the channels created by Congress for the administration of a public law and policy.'" *W.T. Grant Co.*, 168 NLRB 93, 96 fn. 10 (1967) (quoting *H.B. Roberts of Operating Engineers Local 925, v. NLRB*, 350 F.2d 427, 429 (D.C. Cir. 1965)).

<sup>26</sup> As discussed more fully above, with regard to a portion of the settled conduct, we find that DMC did not violate Sec. 8(a)(3) by refusing to hire or consider for hire the May 1995 applicants for employment. This does not affect our finding that DMC's conduct with respect to the settlement agreement violated Sec. 8(a)(1), however.

refusal to hire these applicants, or consider them for hire [in May 1995], actually has continued ‘to date.’” The judge further found that DMC, together with TI as a joint employer,<sup>27</sup> violated Section 8(a)(3) by refusing to hire the June 1997 applicants, even in the absence of a specific complaint allegation of such a violation.<sup>28</sup> In its exceptions, DMC argues that the judge’s “continuing violation” theory of liability is inconsistent with Board law. We agree.

Consistent with its lawful application retention policy, DMC discarded the May 1995 applications 7 days after the union organizers submitted them. Therefore, the applications were no longer “active,” and the judge erred in concluding that, under a “continuing violation” theory, DMC violated the Act when it failed to consider the defunct applications in June 1997. *South East Coal Co.*, 242 NLRB 547, 550–552 (1979) (stating that there is no “continuing violation” theory in Board law for refusal-to-hire allegations in circumstances where the applications at issue are no longer considered active by the employer), rev. denied sub nom. *Bentley v. NLRB*, 653 F.2d 243 (6th Cir. 1981).

DMC and TI also argue that they were denied due process when the judge found a violation that was neither alleged by the General Counsel nor fully and fairly litigated during the hearing. The General Counsel counters that DMC’s conduct in June 1997 was closely connected to the May 1995 and April 1997 hiring discrimination allegations, and that the issue of DMC’s refusal to hire the June 1997 applicants was fully and fairly litigated during the hearing.

Under well-established precedent, the Board may find a violation not alleged in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully and fairly litigated.<sup>29</sup> *Desert Aggregates*, 340 NLRB 289, 292–293 (2003); *Williams Pipeline Co.*, 315 NLRB 630 (1994); *Pergament United Sales*, 296 NLRB 333, 334 (1989), enf. 920 F.2d 130 (2d Cir. 1990). The Board recently approved a judge’s finding that an unalleged issue was “fully and fairly litigated” where the employer did not object during the

hearing that the issue was outside of the scope of the complaint, cross-examined the General Counsel’s witnesses and elicited testimony from its own witnesses on the issue, and addressed the issue in its posthearing brief. *Yellow Ambulance Service*, 342 NLRB 804, 824 (2004) (reciting factual basis for finding an unalleged claim “fully and fairly litigated”). The presentation of evidence associated with an alleged claim, however, is insufficient to put the parties on notice that another, unalleged claim (for which that evidence might also be probative) is being litigated, especially where the two claims rely on different theories of liability. See, e.g., *Piqua Steel Co.*, 329 NLRB 704 fn. 4 (1999) (finding that employer, who put on evidence concerning postdischarge availability of work, was not on notice that its failure to recall was also at issue where complaint alleged only unlawful discharge).<sup>30</sup>

Even assuming that the unalleged claim regarding DMC’s June 1997 conduct was closely connected to the 8(a)(3) hiring discrimination allegations in the first and second complaints, we nevertheless find that DMC’s June 1997 conduct was not fully and fairly litigated as a separate 8(a)(3) claim. First, the evidence concerning DMC’s June 1997 conduct presented by the General Counsel and DMC was relevant to the allegation that DMC violated Section 8(a)(1) with regard to the non-Board settlement agreement. Concededly, there may have been some factual overlap between the evidence associated with the settlement agreement allegation and the hiring discrimination claim. Litigation of the settlement agreement allegation, however, did not require the introduction of evidence germane to the General Counsel’s and DMC’s respective *FES* burdens of proof. Thus, DMC would reasonably believe that the evidence presented concerning its June 1997 conduct related only to the settlement agreement allegation. In these circumstances, DMC was not on clear notice that an unalleged hiring discrimination claim was being litigated. *Piqua Steel Co.*, supra; see also *NLRB v. Quality C.A.T.V., Inc.*, supra at 547; *Conair Corp. v. NLRB*, supra at 1372.

<sup>27</sup> The complaint alleged, and the judge found, that DMC and TI were joint employers after the execution of their second agreement on May 19, 1997. Neither DMC nor TI contest the judge’s joint employer finding. TI does, however, argue that the judge erred in finding it jointly liable for DMC’s conduct. These exceptions are moot in light of our finding that the hiring decisions in question were lawful.

<sup>28</sup> The judge did not rely on the settlement agreement allegations as a basis for finding that DMC’s June 1997 conduct violated Sec. 8(a)(3), and there were no exceptions to the judge’s failure to do so.

<sup>29</sup> Having found that the original complaint allegation directly supported the finding of a violation under the “continuing violation” theory we have rejected, the judge did not consider the alternative theory we discuss here.

<sup>30</sup> See also *NLRB v. Quality C.A.T.V., Inc.*, 824 F.2d 542, 547 (7th Cir. 1987) (“[T]he simple presentation of evidence important to an alternative claim does not satisfy the requirement that any claim at variance from the complaint be ‘fully and fairly litigated’ in order for the Board to decide the issue without transgressing [the respondent’s] due process rights.”), denying enf. to 278 NLRB 1282 (1986); *Conair Corp. v. NLRB*, 721 F.2d 1355, 1372 (D.C. Cir. 1983) (“The introduction of evidence relevant to an issue already in the case may not be used to show consent to trial of a new issue absent a clear indication that the party who introduced the evidence was attempting to raise a new issue.”) (alterations and internal quotations omitted), denying enf. in part. part to 261 NLRB 1189 (1982).

Second, the evidence presented during the hearing in this regard was probative of DMC's motivation for entering the non-Board settlement agreement and not of its motivation for its June 1997 hiring decisions. Had DMC known during the hearing that the motive for its hiring decisions was at issue, and not just its motive for entering into the settlement agreement, DMC likely would have "altered the conduct of its case at the hearing." *Per-gament United Sales*, supra at 335 (stating that whether the absence of a specific allegation precluded a respondent from presenting exculpatory evidence or whether the respondent would have altered the conduct of its case at the hearing, had a specific allegation been made").

Finally, none of the parties argued DMC's June 1997 conduct as an 8(a)(3) hiring discrimination violation in their posthearing briefs to the judge. The parties' posthearing briefing regarding those events focused strictly on the 8(a)(1) settlement agreement allegation. This suggests that, by introducing evidence concerning the events of June 1997, the General Counsel was not clearly attempting to raise an 8(a)(3) hiring discrimination claim as to that conduct. The absence of *FES* rebuttal arguments during the hearing or in DMC's or TI's posthearing briefs concerning the June 1997 conduct further suggests that they were not on notice that an 8(a)(3) hiring discrimination claim regarding that conduct was also at issue. We cannot conclude that the parties, including the General Counsel, were on clear notice that an unalleged 8(a)(3) hiring discrimination claim associated with DMC's and TI's June 1997 conduct was at issue during the hearing. Accordingly, we find that the unalleged 8(a)(3) claim was not fully and fairly litigated, and we shall reverse the judge's finding of this unalleged violation.<sup>31</sup>

#### AMENDED CONCLUSIONS OF LAW

1. Respondents Dilling Mechanical Contractors, Inc. (DMC) and Tradesmen International, Inc. (TI) are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. At all relevant times since May 19, 1997, DMC and TI have been joint employers of all nonsupervisory mechanical trades employees, including pipefitters, welders, pipefitter welders and plumbers on TI's payroll, whom TI has referred to work for DMC on that company's job-sites.

<sup>31</sup> For these reasons, we do not reach DMC's and TI's exceptions to the judge's recommended remedy for the hiring discrimination violations he found but that we dismiss.

4. By engaging in the following conduct, Respondent DMC committed unfair labor practices contrary to the provisions of Section 8(a)(1) of the Act:

- (a) Confiscating union literature.
- (b) Threatening its employees with unspecified reprisals in retaliation for their union activities.
- (c) Creating an impression of surveillance of its employees' union activities.
- (d) Interrogating employees concerning their union sympathies and activities.
- (e) Sending its employees home from work to replace clothing that displayed union insignia.
- (f) Entering into a non-Board settlement agreement with no intention of honoring its terms and thereafter deliberately breaching that agreement.

5. By discharging Steven Jacob because of his union activities, Respondent DMC committed an unfair labor practice contrary to the provisions of Section 8(a)(3) and (1) of the Act.

6. The unfair labor practices set forth above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

7. Respondents DMC and TI have not violated the Act in any other manner.

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Dilling Mechanical Contractors, Inc., Logansport and Fort Wayne, Indiana, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
  - (a) Discharging or otherwise discriminating against any employee for supporting Indiana State Pipe Trades Association, United Association of Plumbers and Pipefitters, AFL-CIO, and Plumbers and Steamfitters Local Union No. 166, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO or any other labor organization.
  - (b) Confiscating union literature.
  - (c) Threatening its employees with unspecified reprisals in retaliation for their union activities.
  - (d) Creating the impression of surveillance of its employees' union activities.
  - (e) Coercively interrogating any employee about their union support or activities.
  - (f) Prohibiting its employees from wearing and/or displaying union insignia while at work.
  - (g) Entering into a non-Board settlement agreement with the union with no intention of honoring the terms of

that agreement and thereafter deliberately breaching such an agreement.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Steven Jacob full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Steven Jacob whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to Steven Jacob's unlawful discharge, and within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its offices in Logansport and Fort Wayne, Indiana, copies of the attached notice marked "Appendix."<sup>32</sup> Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at its Steel Dy-

namics, Inc., Guardian Glass, Silberline, Central Soya, Maple Leaf Duck Hatchery, Fasson and Bluffton Aggregates jobsites in the State of Indiana, at any time since February 15, 1995.

(f) Within 14 days after service by the Region, mail a copy of the attached notice marked "Appendix" to all mechanical trades employees who were employed by Respondent Dilling Mechanical Contractors, Inc. at its above-named jobsites in the State of Indiana at any time from February 15, 1995 until the completion of those employees' work at those jobsites, including to employees jointly employed by Respondent Dilling Mechanical Contractors, Inc. and Respondent Tradesmen International, Inc. The notice shall be mailed to the last known address of each of the employees after being signed by the Respondent's authorized representative.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ordered that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. September 15, 2006

Robert J. Battista, Chairman

Peter C. Schaumber, Member

Peter N. Kirsanow, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

#### APPENDIX

##### NOTICE TO EMPLOYEES

##### POSTED BY ORDER OF THE

##### NATIONAL LABOR RELATIONS BOARD

##### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

<sup>32</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against you for supporting Indiana State Pipe Trades Association, United Association of Plumbers and Pipefitters, AFL-CIO, and Plumbers and Steamfitters Local Union No. 166, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, or any other labor organization.

WE WILL NOT confiscate union literature.

WE WILL NOT threaten you with unspecified reprisals in the event you engage in activities in support of the union.

WE WILL NOT create the impression that we are spying on your union activities.

WE WILL NOT coercively question you about your union sympathies and activities.

WE WILL NOT prohibit you from wearing and/or displaying union insignia while at work.

WE WILL NOT enter into a non-Board settlement agreement with the union with no intention of honoring the terms of that agreement and thereafter deliberately breach such an agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any of you in the exercise of your rights set forth above.

WE WILL, within 14 days from the date of the Board's Order, offer Steven Jacob full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make whole Steven Jacob for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Steven Jacob and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

#### DILLING MECHANICAL CONTRACTORS, INC.

*Walter Steele, Esq.*, for the General Counsel.

*Michael L. Einterz, Esq. (Einterz & Einterz)*, of Indianapolis, Indiana, for Respondent, Dilling Mechanical Contractors, Inc.

*Vincent T. Norwillo, Esq.*, of Solon, Ohio, for Respondent Tradesmen International, Inc.

*William I. Groth, Esq. (Fillenwarth, Dennerline, Groth &*

*Baird)*, of Indianapolis, Indiana., *Paul Long, Lead Organizer*, of Richmond, Indiana, and *Jeffrey E. Jehl, State Organizer*, for the Charging Union.

#### DECISION

##### STATEMENT OF THE CASE

ROBERT M. SCHWARZBART, Administrative Law Judge. This case was tried in Fort Wayne and Indianapolis, Indiana, upon two consolidated complaints issued pursuant to charges filed by Indiana State Pipe Trades Association, United Association of Plumbers and Pipefitters, AFL-CIO, and Plumbers and Steamfitters Local Union No. 166, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, collectively called the Union.<sup>1</sup> Together, these complaints allege that Respondent Dilling Mechanical Contractors, Inc., (DMC), violated Section 8(a)(1) of the National Labor Relations Act, as amended, (the Act), by informing its employees that DMC would not recognize and bargain with the Union if they selected it as their bargaining representative; by informing its employees that it would be futile for them to select the Union as their bargaining representative; by threatening its employees with discharge if they engaged in union activities or chose the Union as their bargaining representative; by confiscating union business cards from its employees; by instructing its employees not to speak to union organizers; by interrogating its employees about their union membership, activities and sympathies; by creating an impression among its employees that their union activities were under surveillance by DMC; and by having entered into the May 20, 1997, non-Board settlement agreement in the consolidated cases then set for hearing in order to evade its liabilities under the Act with no intention of honoring the terms of that settlement, and by deliberately continuing thereafter to violate the settlement in order to frustrate the remedial functions of the

<sup>1</sup> The relevant docket entries are as follows: The original and amended charges in the following cases were filed respectively on the dates shown: Case 25-CA-23973 on May 30 and November 2, 1995; Case 25-CA-24149 on August 22, 1995 and May 31, 1996; Case 25-CA-24600-2 on April 3 and December 16, 1996; Case 25-CA-24600-4 on April 4 and December 16, 1996; Case 25-CA-24600-5 on April 5 and December 16, 1996. The consolidated complaint based on these charges, complaint I, issued on December 17, 1996, incorporated the allegations of three earlier complaints. The allegations of complaint I were resolved for a time by a subsequently-breached non-Board settlement agreement entered into on May 20, 1997. The original charges in Cases 25-CA-25531-1 and 25-CA-25531-2 both were filed on August 12, 1997, and, as of November 20, 1997, each of these latter charges had been amended three times. The consolidated complaint issued pursuant to those charges, herein complaint II, was dated December 4, 1997. On February 23, 1998, upon contested motions by the General Counsel and the Union, I issued an Order which vacated the aforesaid May 1997 settlement agreement and which consolidated and noticed all the above-identified cases for hearing. After the May 20, 1997, transcript record, which principally contained the terms of the parties' subsequently-vacated settlement agreement, the reopened evidentiary hearing took place during 18 days between December 15, 1998, and June 18, 1999.

Act and the Board.<sup>2</sup>

DMC is alleged to have violated Section 8(a)(3) and (1) of the Act by discharging employees Steven Jacob and Randall Collins; by indefinitely laying off Cortney Wheeler; by suspending Kevin Sexton for 1 week; and by refusing to hire, or to consider for hire, 25 named job applicants in 1995 and 34 more in 1997, all because of their union activities or affiliation.

The consolidated complaints further allege that DMC and Respondent Tradesmen International, Inc., (TI), as joint employers, violated Section 8(a)(1) of the Act by interrogating their joint employees about their union membership, activities and sympathies, and about those of their other employees; by telling their employees that they did not want to hire any union members; and by informing their employees that DMC was using TI, a personnel referral service to the construction industry, in order to avoid hiring union members. DMC and TI, jointly, are alleged to have violated Section 8(a)(1), (3) and (4) of the Act by refusing to consider for hire, and hire, job applicant Steven Jacob.

All parties were given full opportunity to introduce relevant evidence, to examine and cross-examine witnesses and to file briefs. Briefs, filed by the General Counsel, DMC, and TI have been carefully considered.<sup>3</sup> On the entire record,<sup>4</sup> including my

<sup>2</sup> In footnote 2 of my above February 23, 1998, Order which, among other things, noticed these matters for consolidated hearing, and orally, the parties were given notice that the issues at the reopened hearing would include whether the General Counsel had failed to meet its own settlement commitments and, if so, whether that party thereby was estopped from alleging, as was done in complaint II, that DMC had violated the Act by having entered into the settlement agreement with no intention of complying therewith.

<sup>3</sup> Counsel for the General Counsel moved that DMC's posthearing brief be stricken because untimely filed. DMC's brief was date-stamped as received on the day after the due date and it came in about half a business day after the General Counsel's brief. However, subsequent to the arrival of DMC's brief, the General Counsel submitted a request to substitute 11 there-enclosed corrected pages for the corresponding pages originally contained in his 61 page brief. As DMC's brief was received in its final form before the General Counsel's, that party lacks standing to make this Motion to Strike. Accordingly, the motion hereby is denied.

The General Counsel also moved to strike an affidavit that had been appended to TI's brief for the purpose of clarifying an exhibit received in evidence. This motion was made on the ground that the record did not provide for its unilateral submission. The General Counsel further argues that receipt of this affidavit would deprive him of opportunity to cross-examine the affiant who, assertedly, could have been made available at the trial but had not been called as a witness. The General Counsel also would not be able to cross-examine an individual other than the affiant who was described in the affidavit as having acted on TI's behalf. The General Counsel did not know this other person, who also had not testified at the hearing.

TI, in turn, contrary to the General Counsel, argued in its brief that, since the witness who had been called to testify concerning its records offered as exhibits had not been able to offer explanations of the matters at issue that I, in fact, had left the record open for receipt of this affidavit.

Having reviewed the relevant record, I hereby grant the General Counsel's Motion to Strike this affidavit. While I share the parties' concern that the record in this matter be complete, the General Counsel correctly asserts that I merely had called for resolution of the matters

observation of the demeanor of the witnesses, I make the following

## FINDINGS OF FACT

### I. JURISDICTION

Respondent DMC, a corporation with its principal office and

addressed in the affidavit by stipulation. Absent such a stipulation, it became TI's obligation to present its proofs in the usual way, by calling witness(es) at the trial who then could be cross-examined. The inability to reach a stipulation did not enable me, without the other parties' expressed consent, to validly authorize TI to unilaterally introduce an evidentiary posthearing affidavit to pursue its objective. As the General Counsel points out, such a course would prejudicially deny him of his right to cross-examine one and, possibly two, witnesses.

<sup>4</sup> The General Counsel has filed a posthearing motion requesting that summaries of his Exhibits 49 and 50, appended to his brief, be entered into the record in place of his Exhibits 49 and 50, which were received in evidence during the hearing. General Counsel's Exhibits 49 and 50, as introduced, are voluminous unabridged computer printouts of DMC payroll records intended to show the existence of job opportunities at DMC during certain relevant periods. General Counsel's Exhibit No. 49 roughly covers the last half of 1995, while Exhibit No. 50 relates to the period from April through June 1997. The General Counsel had been given leave to retain these multithousand page exhibits after the hearing closed for the purpose of obtaining stipulations concerning them from the other parties. When such stipulations could not be achieved, the General Counsel forwarded the original payroll record printouts for inclusion in the exhibits file while appending his own summaries of the records to his brief. The General Counsel's arguments in support of substituting his summaries for the original records principally center on his efforts to obtain enabling stipulations from opposing counsel.

Counsel for DMC and TI filed oppositions to the General Counsel's Motion. TI, noting that these sizable payroll records had been received during the hearing without explanation, summary or interpretive analysis, argued that, in the absence of stipulated summaries of same by the parties, the General Counsel's Motion should be denied. In this regard, TI asserts that the General Counsel had not "proposed a suitable payroll record summary to Respondents," that no relevant stipulation was reached and that, accordingly, these payroll records should remain in the record as originally received. Counsel for DMC, in turn, contended that the Motion should be denied because the General Counsel was attempting to replace duly admitted Exhibits 49 and 50 with assertedly incomplete summaries which inaccurately conclude that there were job openings during certain relevant months.

In the absence of agreement, I must deny the General Counsel's motion to substitute the payroll record summaries for the records themselves. These records, the authenticity of which has not been questioned, remain the primary undisputed evidence of their content. I cannot make secondary synopses of their comprehensive data binding on opposing counsel over their objection. However, I will take the General Counsel's summaries of these exhibits into account as his contention in argument as to what these exhibits reveal. As such, the General Counsel's summaries were appropriately included with his brief.

Finally, the record hereby is corrected to show that General Counsel's Exhibits Nos. 49 and 50 are the above described DMC payroll records, rather than the two items of correspondence which had been so marked and forwarded by the Court Reporter. I note that these letters, inappropriately placed in the exhibit file as 49 and 50, had been respectively included under Tradesmen International Exhibits Nos. 11 and 12 in evidence.

place of business in Logansport, Indiana,<sup>5</sup> has been engaged in the construction industry as an electrical, mechanical and general contractor. During each of the two 12-month periods preceding the respective issuance dates of complaints I and II, (Respondent DMC) in the course and conduct of its business operations, provided services valued in excess of \$50,000.00 to enterprises within the State of Indiana which were directly engaged in interstate commerce. Respondent DMC admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

At all material times Respondent TI, a corporation with an office and place of business in Indianapolis, herein Respondent TI's facility, has been a construction labor leasing agency engaged in providing labor to clients which are businesses engaged in the construction and other industries. During the 12 months preceding issuance of complaint II (Respondent TI) in conducting its business operations, provided services valued in excess of \$50,000.00 to enterprises within the State of Indiana which were directly engaged in interstate commerce. Respondent TI having admitted the relevant jurisdictional complaint allegations, I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Both Respondents admit, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

### A. Background

#### 1. An overview of the events

Respondent DMC, principally based in Logansport, with an office in Fort Wayne, had been a mechanical, electrical, and general contractor in the construction industry from 1980 through 1997, with worksites located throughout Indiana. DMC performed mechanical contracting, plumbing and wiring services, employing pipefitters, welders, pipefitter/welders, plumbers and electricians. Since January 1998, DMC has continued in business solely as a general contractor, employing professional engineering and managerial personnel. Richard L. Dilling was DMC's founder, president and sole shareholder. Prior to 1998, Dick Eldridge and Stan Beecher were DMC's field superintendents at the Logansport and Fort Wayne offices,<sup>6</sup> respectively, reporting directly to Dilling. Eldridge and Beecher had held like positions, serving different geographic areas within the State of Indiana. Eric (Rick) Colwell<sup>7</sup> and Nelson Jordan were Fort Wayne-based job foremen reporting to Beecher who provided general field supervision for projects arising in that area.

The Union began its organizing drive among DMC's employees around the end of February 1995, conducting numerous meetings with employees employed at DMC's various worksites, particularly at its major operation at Steel Dynamics, Inc. (SDI), in Butler. During these meetings, union representatives

distributed hats, t-shirts and other items bearing the union logo, which certain employees wore to work. The Union also sent letters to DMC identifying employees who were members of its organizing committee and warning that it would be unlawful for DMC to discriminate against the named employees for that reason.

Complaint I alleges that DMC had committed nine independent violations of Section 8(a)(1) of the Act and that it variously had violated Section 8(a)(3) and (1) of the Act by discharging two employees, by indefinitely laying off a third employee and by suspending a fourth employee for a week because of their respective activities and/or support for the Union. DMC also was charged with having further violated Section 8(a)(3) and (1) of the Act by discriminatorily refusing to hire, or to consider for hire, 25 job applicants whose applications assertedly had been brought to DMC by the Union. The complaint I allegations were noticed for trial on May 19, 1997.

On May 20, 1997, the parties agreed to a non-Board settlement. The terms of this settlement, to which the General Counsel did not object, contained six provisions, which will be detailed below. The two most significant terms were: (1) that DMC would submit a \$35,000 lump sum check representing gross backpay to the Regional Office, the proceeds of which were to be distributed by that office to the alleged discriminatees in consultation with the Union; and (2) that DMC would meet its needs for mechanical trades employees during a 9 month period by hiring on a one-for-one basis workers drawn from two preferential hiring lists. The first list was to be a DMC prepared compilation of employees whom it had been interested in reemploying, e.g. employees in layoff status and certain other favorably regarded former workers. The second list was to have contained the names of the 25 job applicants alleged in complaint I as discriminatees.

Although the terms of this settlement were fully set forth in the May 20, 1997, transcript, the later record of this proceeding reveals that neither DMC nor the General Counsel thereafter fully kept their recorded commitments. DMC did not hire any workers from the two lists and the General Counsel, for reasons unrelated to DMC's failure to hire, did not distribute the backpay. On June 2, 1997, without the knowledge or consent of the Union or General Counsel, DMC contractually delegated a pared down version of its hiring and employment obligations under the settlement to TI, a personnel leasing, or manpower, service to the construction industry. Appending two preferential hiring lists to its June 2 contract with TI, akin to those called for in the settlement agreement, DMC included a provision in that contract to the effect that TI, for the next 6 months, was to offer opportunities for employment to persons on the two lists, alternating back and forth between the two lists on a one-for-one basis.<sup>8</sup> TI previously had not been involved in this proceed-

<sup>5</sup> All locations are within the State of Indiana unless otherwise indicated.

<sup>6</sup> DMC's Fort Wayne office had never done electrical work.

<sup>7</sup> Colwell's name, which incorrectly appeared throughout the record of this proceeding as "Caldwell," is hereby corrected sua sponte.

<sup>8</sup> Under the terms of the settlement, DMC had been committed to hire from the two lists on a one-for-one basis for 9 months, rather than the 6 month period DMC passed along to TI. Also, the alleged discriminatees' preferential hiring list appended to DMC's June 2 contract with TI contained only 23 names—two less than were provided in the settlement. On the other hand, DMC's own list included three to four times the number of names that were on the alleged discriminatees'

ing.

Accordingly, by transferring its hiring/employment commitments under the settlement to TI without the consent of the other parties to that agreement, DMC unilaterally evaded its pledge to directly hire and employ the mechanical trades employees who continued to work, as before, on its jobsites under DMC supervision. DMC had set the stage for this delegation to TI on May 19, 1997, the date when the hearing in complaint I had been scheduled to open, when it signed its first contract designating TI as "the exclusive source of subcontract labor on all of its projects," to "fulfill all non-supervisory labor requirements as requested by Customers." DMC's further June 2 delegation to TI of a reduced version of its assumed settlement obligations supplemented the process that had begun on May 19.

Additionally, during a 3-week period, starting on June 27, 1997, at DMC's Steel Dynamics, Inc. (SDI), jobsite in Butler and continuing at its other projects, DMC serially transferred all its nonbenefited employees<sup>9</sup> from its own payroll to TI's direct employ. Workers who refused to promptly accept this transition were permanently laid off terminated at the end of their respective changeover days. Employees who agreed to transfer to TI, although thereafter paid by TI, continued to work as they had for DMC, staying at the same jobsites under the same DMC supervision and performing the same tasks. DMC field superintendent Stan Beecher and TI representative Michael J. Morris<sup>10</sup> participated together in this transition process, which will be described in greater detail below.<sup>11</sup>

DMC, having ceased to directly employ the great majority of its field employees in slightly more than a month after the settlement, thereafter operated solely as a general contractor. During the last half of 1997, DMC's owner, Dilling, created Dilling Mechanical, Inc. (DMI) to continue, as a DMC subcontractor, to oversee the mechanical work on its various jobsites. Since January 1998, when DMI became operational, TI has been

referring its mechanical trades employees for work on Dilling jobsites to DMI, instead of to DMC. DMC's former benefited employees were moved to DMI's payroll, becoming minority shareholders there. Dilling's nephew, Eric Ott, president of DMI, had been vice president of DMC before January 1, 1998, when DMI opened for business. DMI, which was 70 percent owned by Dilling, shared a common address and certain other assets with DMC.

DMC analogously devolved its electrical work to a subcontractor, Dilling Electrical Contractors, Inc. (DEC), formed within the same time frame as DMI. Dilling's wife, Beverly Dilling, who became president of DEC when it, too, became operational on January 1 1998, had been DMC's personnel director.

Following the above events, the General Counsel, in complaint II, first impleaded TI as a joint employer and co-Respondent with DMC. Complaint II alleges that, since the issuance of the first complaint, DMC had variously violated Section 8(a)(1) of the Act; that, in violation of Section 8(a)(3) and (1) of the Act, DMC had discriminatorily refused to hire 11 job applicants whose employment applications had been given to DMC by the Union; and that the joint Respondents had violated Section 8(a)(1), (3) and (4) of the Act by refusing to hire, and to consider for hire, Steven Jacob for his union activities and/or affiliation and because he had given testimony to the General Counsel in the prior, originally settled consolidated cases. Jacob's May 1995 discharge by DMC had been alleged as unlawful in complaint I.

Also at issue is whether the General Counsel is estopped from alleging, as in complaint II, that DMC had violated Section 8(a)(1) of the Act by entering into the May 1997 settlement agreement with no intention of complying with that accord on the ground that that party, for reasons unrelated to DMC's non-performance, had failed to comply with its own settlement commitment to distribute the agreed backpay.

## 2. Litigation history

In 1995 and 1997, respectively, the Board and the U.S. Court of Appeals for the Seventh Circuit in *Dilling Mechanical Contractors, Inc. (Dilling I)*,<sup>12</sup> found that DMC had perpetrated 13 violations of Section 8(a)(1) of the Act. These violations included, but were not limited to, threatening employees with discharge and/or reprisal if they engaged in union and protected activities or displayed union insignia; imposing various more rigorous terms and conditions of employment on its employees; interrogating employees about their own union activities and those of other employees; conducting surveillance and creating impressions of surveillance; and instructing employees to cease their union and protected activities.

The Respondent also was found in this earlier case to have violated Section 8(a)(1) and (3) of the Act by issuing verbal or written reprimands to four employees; by imposing more onerous and rigorous terms and conditions of employment upon certain employees; by respectively constructively and actually terminating two employees; and by failing to reinstate five

lists. DMC's additional unilateral reductions in its settlement commitments as delegated to TI will be considered below.

<sup>9</sup> DMC's benefited employees were a comparatively small, more permanent cadre who received job benefits and moved with DMC from job to job. Nonbenefited employees, who had comprised the bulk of DMC's work force, worked without job benefits at specific jobs with no understanding that they would be retained for further employment at other worksites when the job they were working on was completed. This, however, occasionally happened. Nonbenefited employees were known as "boomers," an industry term for construction workers from elsewhere who traveled in search of work.

<sup>10</sup> Morris' field representative position with TI's Indianapolis office in June 1997 principally was in sales. In October 1997, he became sales manager in that office. A year later, Morris was named a TI division manager, major accounts division, Cleveland, Ohio. This was Morris' title when he testified at the hearing.

<sup>11</sup> Although complaint II alleged as violative of Sec. 8(a)(1) of the Act two statements allegedly made by asserted supervisors and agents of DMC and TI to the effect that DMC was laying off and, simultaneously, transferring its nonbenefited employees to TI's direct employ for union related reasons, that complaint does not allege the actual layoffs and transfers as violative. Also, since the General Counsel has not argued these transfers be remedied, no finding will be made concerning them. *Redd-I, Inc.*, 290 NLRB 1115 (1988).

<sup>12</sup> 318 NLRB, supra, 1140 (1995), enf'd. 107 F.3d 521 (7th Cir. 1997), cert. denied 522 U.S. 862, 156 LRRM 2544 (1997).

unfair labor practice strikers who had made repeated unconditional offers to return to work.

An emphasized finding in *Dilling I* was that, in order to counter the Union's organizing campaign in that case, DMC had moved all its targeted employees to a single jobsite, where they were placed under the control of an expeditor. Although this expeditor had no experience in doing the skilled electrical work that these employees were performing, he had been given the exercised authority to oversee their work; to handle all personnel matters; and to subject the employees at that site to stricter surveillance of their work product. The expeditor was found to have conducted this stricter surveillance by standing near and over these employees while they worked and by physically intimidating and verbally abusing such employees. DMC's conduct through this expeditor, which was found to have been independently violative of Section 8(a)(1) of the Act and also of Section 8(a)(3) and (1), further was held to have provoked the above unfair labor practice strike from which the strikers had made their unsuccessful unconditional offers to return to work.

#### *B. The Breach of the Settlement Agreement*

##### 1. DMC's postsettlement hiring practices—facts

Because the failure of DMC and the General Counsel to comply with the settlement agreement is of continuing relevance here in assessing the measure of DMC's antiunion animus and, also, to determining whether the General Counsel is thereby estopped from pursuing an alleged violation of the Act referenced in complaint II, it is necessary to consider what happened after that settlement was reached.

Paragraph 5(b), in conjunction with Paragraph 9, of complaint II alleges as violative of Section 8(a)(1) of the Act that:

About May 20, 1997, Respondent Dilling (DMC) entered into a settlement with the Union in Cases 25-CA-24600-2 Amended, 25-CA-24600-4 Amended, and 25-CA-24600-5 Amended with no intent of honoring the terms of that settlement and for the purpose of evading its liability under the Act, and since that date, Respondent Dilling has deliberately violated that settlement with the purpose of frustrating the remedial functions of the Act and the Board (parenthesized material supplied).

The terms of that May 20 non-Board settlement were entered into that day's transcript record, as follows:

No. 1. All charges involved in this case (as it then existed), including charges 25-CA-23973, 24149, 24600-2, 4, and 5, all, as amended, are withdrawn.

No. 2. Dilling (DMC) shall pay the Office of Compliance of the General Counsel for distribution to all individuals involved in the charges underlying this case \$35,000.00 within 30 days.

No. 3. Dilling and the Charging Parties, as represented by Paul Long, will agree to a notice to be posted by Dilling at its offices for a period of 30 days, beginning on June 15th,

1997.<sup>13</sup>

No. 4. Dilling will meet in good faith with the representative of the Pipefitters Union at a mutually convenient time within the next 30 days. The parties will arrange this meeting.

No. 5. Dilling will establish a hiring list for the period of nine months, beginning on June 15th, 1997, including Dilling's list of May 15th, 1997, and incorporating a discriminatees list of up to 25 people, identified as Steven Baer, Jerry Berghoff, Chris Blaising, Phillip Davis, Bret Finch, Ronald Harding, Paul Herrmann, Matthew Hickey, Edward Hinen, Patrick Hofman, James Kaylor, James Keplinger, Aaron Kerr, Daniel Krill, Leonard LaBundy, Todd Mikel, Kurt Prosser, James Rader, Jonathan Rekeweg, Fred Spade, John Stayanoff, Rogers Summers, Brad Yoder, Ted Zabel, Malcolm Zimmer, also known as Randall Jackson, and Kevin Sexton. Based upon their applications, references, and abilities, the discriminatees' list shall be based upon applications received by Dilling as of June 10th, 1997, and accepted by Dilling based upon a review of the applicant's application, references, and abilities. All persons selected from the hiring list must pass a drug test and company physicals, as required. Dilling will hire one person from the discriminatees' list for each person hired from the May 15th, 1997 list.

No. 6. Dilling agrees not to discriminate against future applicants or employees.

\* \* \* \*

JUDGE SCHWARZBART: In an off the record discussion, . . . it has been decided that the agreed sum of \$35,000.00 will be distributed by the Region's Compliance Officer in consultation with the charging union and at this point I gather that the Union has moved for withdrawal of the charges. Is that correct?

MR. LONG: Yes, sir.

JUDGE SCHWARZBART: And there's no objection on the part of anybody?

MR. EINTERZ: That is correct.

MR. STEELE: There is no objection on behalf of—on behalf of the General Counsel.

As noted, it is undisputed that on June 2, 1997, less than 2 weeks after DMC entered into the above settlement, it signed a new agreement with TI whereby TI was reaffirmed as DMC's "exclusive source of temporary labor on all of its projects." Under this arrangement, in exchange for negotiated sums paid by DMC, TI leased its own employees to DMC for work at DMC's various jobsite projects under the direction of DMC supervisors.

In unilaterally delegating to TI its settlement obligations to

<sup>13</sup> Although it is undisputed that Union Head Organizer Paul Long and DMC's attorney, Michael L. Einterz, Esq., had tried to reach agreement on the language of a notice to be posted, faxing draft notices back and forth, and that DMC actually had posted copies of a notice at its offices for the agreed period, Long denied that the Union ever had consented to the wording of that posted notice. In view of the more significant breaches of the settlement to be found, there is no need to resolve here whether there had been actual agreement on the posted notice.

hire and employ the individuals on the two preferential hiring lists, in addition to appending the two lists to the June 2 contract, DMC included as Paragraph 4 of that agreement the following provision:

During the next six months, Tradesman (TI) agrees to offer employment opportunities to the individuals listed on the attached Employment Lists 'B' and 'C' as follows: (a) for each person offered an opportunity to apply for employment from List 'B',<sup>14</sup> one individual will be offered employment from List 'C';<sup>15</sup> (b) employment will be offered to any individual from Lists 'B' or 'C' who properly qualifies after Tradesman has fulfilled its obligations to third parties, so long as Tradesman is seeking employees.

DMC's delegation to TI of its hiring and employment obligations, as conveyed, was less extensive than its own above agreed settlement commitments in the following three respects:

First, while the settlement accord specified that DMC would hire, alternating between the two lists, for a period of 9 months, TI, under its contract with DMC, was required to do so for no more than 6 months.

Second, the final phrase of Paragraph 4, above, further lowered the hiring priority to be afforded those named on the two preferential lists by requiring that TI use the lists only after that Company "has fulfilled its obligations to third parties, so long as Tradesman is seeking employees." This obligation to third parties will be discussed below under the third aspect. However, the further depriorization of the use of the lists embodied in the phrase "so long as Tradesman is seeking employees" independently shifted the hiring emphasis from fulfilling DMC's employment needs to meeting those of TI.

Third, Paragraph 5 of the June 2 agreement, which also appeared in these parties' prior, May 19, contract, yet further reduced the hiring priority to be afforded the individuals on the two appended lists by requiring that TI, in first fulfilling its "obligation to third parties," offer employment to yet another class of workers before resorting to the lists. Paragraph 5 is as follows:

Tradesmen (TI) agrees to contact all of Customer's (DMC's) employees who Customer lays off in fulfillment of this Agreement and offer them an opportunity to be employed with Tradesmen. Tradesmen agrees to send letters to all former employees of Customer who do not agree to employment opportunities with Tradesmen informing them that Tradesmen is required to offer employment opportunities to them, and extending to them an offer of employment up to and including July 15, 1997<sup>16</sup> (parenthesized matter supplied).

In sum, the above quoted contractual provision gave em-

ployees whom DMC anticipated laying off for not accepting transfer to TI's payroll, higher employment priority than the individuals on the two lists established by the settlement. This proviso became relevant when, commencing June 27, 1997, DMC serially moved its nonbenefited employees at all its jobsites to TI's direct employ. In doing this, DMC immediately permanently laid off those employees who did not agree to continue working on DMC jobsites as TI employees.<sup>17</sup>

DMC's president and sole shareholder, Richard L. Dilling, testified that his company's first, October 10, 1996, contract with TI had provided that TI furnish DMC with help in all trades—mechanical, electrical, general, laborers and operating engineers. TI established the hourly pay rates and was responsible for maintaining unemployment insurance, workers compensation, and make the standard deductions from pay for taxes, et al. In exchange, DMC paid TI a negotiated sum, which took into account TI's above expenses and profit margin. Employees referred to DMC by TI worked at DMC's jobsites under the direction of DMC's supervisors. However, such employees were not discharged or disciplined by DMC, but were sent back to TI for reassignment to other contractors or for applicable discipline. Under the 1996 agreement, unlike those in May and June 1997, TI was not designated as DMC's sole source of employees.

Dilling related that he had been contemplating discontinuing the use of nonbenefited employees<sup>18</sup> employed directly by his company and replacing them with leased workers since 1996 and, in that earlier period, he had experimented with several employee leasing concerns before settling on TI. Dilling explained that the use of leased employees improved DMC's profitability and eased its administrative burdens. DMC was able to eliminate staff and was not required to build up or reduce the number of its own employees in order to meet the differing amounts of available work, seasonal or otherwise. DMC also no longer was obliged to make payroll deductions for TI referred workers and to pay the costs related to workers and unemployment compensation. Dilling pointed out that unemployment compensation had been a major expense item for his business because so many workers were employed short-term. Dilling testified that his company's use of TI was "strictly a business decision."

As noted, during a 3-week period, starting at the SDI jobsite on June 27, 1997, and moving sequentially to all its other job-

<sup>14</sup> List B, appended to the June 2 contract, contained the names of persons whom DMC was interested in hiring—former DMC employees, workers privately referred to DMC and workers on layoff.

<sup>15</sup> List C to the June 2 agreement set forth the names of 23 of the 25 individuals alleged as discriminatees in complaint I and named in the settlement agreement.

<sup>16</sup> There was no corresponding obligation to send letters offering employment to the individuals named in the two appended hiring lists.

<sup>17</sup> The two employment lists appended to the June 2 contract contained an inherent ambiguity which potentially even further reduced the employment prospects for the 23 employees actually named on the alleged discriminatees appended list. This was because the Employer sponsored list to be used in alternation with the list of alleged discriminatees was much longer. Far more than the 23 names of alleged discriminatees, the names on the DMC list occupied a series of single-spaced columns three letter-size pages long. While the record does not show what TI's Morris actually did in this regard, he could have opted to oblige his company's client, DMC, by proceeding to contact all the remaining additional names on the DMC list after exhausting the shorter discriminatees list, before again going to the tops of the two lists and resuming one-for-one usage.

<sup>18</sup> In peak periods, DMC employed two nonbenefited employees to every one who was benefited.

sites, DMC transferred to TI's direct employ all its nonbenefited employees. This category included temporary, single job workers, all workers not on per diem, individuals from outside DMC's general area who traveled from job to job and summer help. Under this changeover, the affected employees would continue to work at their old jobs under DMC supervision, but would become directly employed by TI in the manner described above. Dilling did insist that TI give every employee so transferred a 25-cents/hour pay increase above what they had received while at DMC.

TI representative Michael J. Morris who, with DMC Area Superintendent Stan Beecher, had participated in the changeover process whereby TI absorbed DMC's nonbenefited employees, was given the task of offering work to the former DMC personnel who had not wanted to work for TI.<sup>19</sup> Morris, in regular consultation with Dilling, also had the responsibility of offering employment to the individuals named in the two settlement-related preferential hiring lists appended to TI's contract with DMC. Morris testified that the requirement that TI first offer work to former DMC employees laid off during the changeover did not delay his prompt recourse to the two hiring lists because his need for workers had become so great.

Morris related that, starting on June 28, 1997, he began calling employees on the two lists from his home.<sup>20</sup> Morris testified that he went back and forth through the lists for the first time in about 10 days—without being able to hire any one from either list. Morris then repeated this process. Although Morris contended that he had continued to use the two lists until March 1998, offering employment to any prospective worker he could reach, he was able to hire only one contacted individual, Mike Rastanis in November 1997. Rastanis' name was drawn from the DMC list. TI hired none of those named on the alleged discriminatees' list.

The General Counsel has produced counter evidence generally denying that the individuals named in the listing of alleged discriminatees had been contacted by Morris. In this regard, the General Counsel called five rebuttal witnesses whose names had appeared on the alleged discriminatees list, Leonard P. LaBundy, Steven R. Baer, Bret Finch, Ronald M. Harding and James D. Rader. All of these individuals testified that, although they had been journeymen in their relevant trades for from four to 35 years and had completed job application forms in 1997 for employment at DMC, which they all had timely submitted to the Union for forwarding to that company, they were not contacted between June 28, 1997 and March 1998 with job offers by any representative of DMC or TI. They also testified that no such offers had been relayed to them by their spouses or left on their telephone answering machines.

The parties, in order to avoid cumulativeness, further stipulated that if 17 other identified individuals also on that list, virtually comprising all those who had been named thereon, had been called to the stand, they would have testified that, like

the above five summoned witnesses, they had been members of the Union during all relevant times; that, first, at the Union's request in the spring of 1995, that they had completed job applications for work at DMC which they had turned over to authorized union representatives, and that they did not thereafter receive any job offers from the Dilling companies. They further would have testified that 2 years later, shortly after the May 20 settlement agreement, the Union had given these same individuals DMC job applications which they had completed and mailed back to the Union; and that, from June 28, 1997, through March 1998, they had received no direct or relayed job offers from TI's Morris or from any Dilling representative.

## 2. DMC's postsettlement reorganization—facts

The record shows that on January 1, 1998, having transferred its current nonbenefited employees to TI and having delegated the future hire and employment of such employees to that Company, DMC became a general contractor engaged in all construction trades. Since then, it has done its actual construction work only through the use of subcontractors.

In so transforming itself, DMC, after January 1, 1998, transferred oversight of work for the plumbing, pipefitting and welding employees, and those who performed heating, ventilating and air conditioning (HVAC) work on its projects to its newly formed subcontractor, DMI.<sup>21</sup>

DMC owner Dilling testified that he had invested \$200,000 for 70 percent of DMI's stock and a place on its board of directors. Eric Ott, Dilling's nephew and, until then, vice president of DMC, became DMI's president. Dilling, the only witness to testify concerning DMI, explained that, while he did not know the names of DMI's other officers and directors, all of DMI's approximately 35–40 employees previously had been employed by DMC. DMC's former benefited field employees, so transferred, became shareholders and directors in DMI. All had been moved to DMI by January 1998. These employees had become shareholders and directors by exercising options to purchase the remaining DMI stock which had been given to them at meetings conducted by DMC in late 1997. At those meetings, DMI's formation was announced and its impact on the DMC work force was explained. Since January 1998, DMI has performed the same mechanical work as previously had been done by DMC, on the same jobsites.

Once operational, DMI managed and supervised the work of TI referred employees on DMC projects as a DMC subcontractor. TI then began to refer the workers to DMI while remaining responsible for paying such employees, for making the relevant payroll deductions and for providing job benefits. As described by Dilling, there were no TI supervisors on the Dilling work locations and employees referred by TI were subject to discharge or other discipline by TI for violating DMC/DMI work rules.

The record shows that DMI was located in the same Logansport and Fort Wayne buildings that housed DMC; that the two companies had the same addresses; that they shared the same

<sup>19</sup> Certain former DMC employees testified that they refused to sign up with TI because they had not wanted to go to a manpower agency.

<sup>20</sup> Although Morris offered various reasons, including having moved to another state since making all of these business calls from his home, he could offer no supportive telephone records of these attempts to hire.

<sup>21</sup> DMC moved its benefited employees to DMI in January 1998. DMI actually was established in September 1997, but did not begin operations until the following January.

support staff and vehicles, and that DMI did not pay rent to DMC.<sup>22</sup> DMC and DMI had separate telephone numbers, book-keeping and payrolls. Most officers, directors and staff of DMI formerly had been with DMC.

In the same time frame as when DMI was established, Dilling Electrical Contractors (DEC) also was formed to serve as an exclusive DMC electrical subcontractor. Dilling's wife, Beverly Dilling, became president and owner of 70 percent of that company's stock. DEC, like DMI, began operations on January 1, 1998. Dilling testified that Mrs. Dilling, who had been DMC's personnel manager, had put her own money into the new enterprise. Dilling denied that he personally had made any capital contributions to DEC. Like DMI with respect to the mechanical trades, DEC employed the electrical employees who previously had been with DMC.<sup>23</sup>

### 3. The General Counsel's conduct concerning the settlement—facts

While it is undisputed that DMC partially complied with the settlement terms by timely forwarding the agreed \$35,000 undivided backpay check on June 19, 1997, to the Regional Office compliance officer, it is equally undisputed that that Office, instead of dividing and distributing the check's proceeds among the alleged discriminatees, returned it to DMC on August 25, 1997. The General Counsel's stated reason for returning the check intact to DMC, unrelated to DMC's failure to hire and employ under the settlement, was that it had not complied with the Regional Office's postsettlement requests that that Employer divide the check among the recipients<sup>24</sup> and deduct therefrom the standard tax and other withholdings.

The recorded May 20 settlement, however, provided only that DMC would meet its there assumed backpay obligation by submitting the undivided \$35,000.00 check to the Regional Office compliance officer for distribution by that official in consultation with the Union.

The check was submitted in this form because DMC, throughout all discussions leading to the settlement, had flatly refused to divide the check and/or to make standard withholding deductions for income tax and other items before forwarding it. This unambiguous position was known to, and considered by the General Counsel and Union at the time. DMC's stance in this regard resulted in some presettlement contention between the General Counsel and DMC. Therefore, the matter was fully before the Regional Office when it decided not to object to the settlement. Some of the Region's concern in this regard was expressed in the May 20, 1997, record where, quite to the end, the General Counsel sought alternative means of distributing the money, including by having the check sent directly to the Union for disbursement. From the parties' May 19–20 discussions, DMC, for its own reasons, made clear that it

would not have entered into the non-Board settlement agreement had it been required under the terms of that accord to divide or to make withholding deductions from its backpay check. DMC's offer to transmit its backpay check in a gross, lump sum payment to be divided and allocated by the General Counsel, in consultation with the Union, ultimately was accepted by the other parties on May 20 as a compromise necessary to obtain what then appeared to be a worthwhile resolution, avoiding a difficult lengthy trial and the attendant risks.

So, when the Regional Office returned this backpay check intact to DMC in August 1997, it did so for the stated reasons that DMC had not divided the proceeds into separate checks payable to the respective intended recipients; that the standard withholding deductions had not been made and that the General Counsel's attempts at getting DMC to make these itemizations had been unsuccessful.<sup>25</sup> These qualifications, however preferable, ran contrary to the parties' May 20 agreement.

Paul Long, the Union's chief organizer and senior participating official during the settlement negotiations, in effect, expressed surprise at the Regional Office's later refusal to disburse the proceeds of the undivided check. Long testified that, after the May 1997 settlement was reached but before being informed that the check actually had been received by the Regional Office, he had furnished the Region with a list showing how the Union thought the backpay proceeds should be allotted. This list showed the amounts that the Union thought should go to each claimant and included the various recipients' social security numbers.

Long related that he later was informed "by someone from the Region" that it was not going to distribute the money. He was told that it "wasn't their job, they weren't going to do it. They acted like they didn't need to give me a reason." The Region had told him that there was the possibility that they could get DMC to divide the check; then the Region could get some information from Long concerning deductions. However, the Regional Office did tell Long that "they could not divide the check or disburse that check . . . Said it wasn't their job. I don't know why . . . I never got a reason I know of, no, Sir, I never got a reason." According to Long, the Region had never asked him for more information than he had provided in furnishing the proposed distribution amounts and the claimants' names and social security numbers.

### 4. The breached settlement agreement—discussion and conclusions

#### a. DMC's postsettlement conduct

The Board in *Independent Stave Company, Inc.*,<sup>26</sup> noted that it:

<sup>22</sup> While DMC owned the Fort Wayne building, Dilling Real Estate Corp. held title to the Logansport property.

<sup>23</sup> While DMC's electrical employees had been of central significance in DMC I, the present matter involves employees in the mechanical trades.

<sup>24</sup> The General Counsel's brief advises that, following the settlement, the parties had reached agreement as to the gross backpay sums to be paid to each of the alleged discriminatees.

<sup>25</sup> The General Counsel contends that, having agreed to perform the ministerial act of distributing the checks, it thereafter did what it could to obtain the necessary information to bring this about. The General Counsel represented that he had called DMC's attorney asking that the Company make the appropriate deductions for each of the alleged discriminatees and to transmit separate checks to the Regional Office, making "numerous attempts" in this regard.

<sup>26</sup> 287 NLRB 740, 741 (1987).

... has a long had a policy of encouraging the peaceful, nonlitigious resolution of disputes. . . . On a number of occasions, the Board has reiterated its commitment to private negotiated settlement agreements and its policy of 'encouraging parties to resolve disputes without resorting to Board processes. . . . ('Congress was aware that settlements constitute the 'life blood of the administrative process, especially in labor relations.' [citations omitted])

The record makes plain that while DMC did timely remit the specified backpay check in the agreed form to the Regional Office compliance officer, it did not fulfill the part of its May 1997 covenant that related to the future hire and employment of mechanical trades employees from the two preferential hiring lists. DMC's failure to do so renders moot other, less significant terms of the settlement, such as whether it, in fact, had posted an agreed remedial notice and whether its representatives thereafter had met in good faith with counterparts from the Union.<sup>27</sup> What is further at issue is whether DMC also had failed to keep the sixth settlement provision, its agreement not to unlawfully discriminate against future job applicants.

In this regard, it is noted that, although the General Counsel has proved, consistent with the testimony of TI's Morris, that there were job opportunities at DMC's jobsites in the relevant job classifications in the months after the 1997 settlement and that workers were hired to fill those jobs, not one applicant on the list of alleged discriminatees was hired or admits having been contacted for employment. That the process for future hiring established in the settlement should have gone awry could be expected as DMC, less than 2 weeks later, violated both the letter and the spirit of the settlement agreement by unilaterally delegating its hiring and employment obligations in this regard to TI, an entity completely distinct from itself. DMC had given no prior indication that any party but itself would be responsible for compliance with the commitments it therein had assumed.<sup>28</sup> TI had not been bound under the settlement terms and Morris testified that he did not learn until months later that the hiring lists appended to TI's June 2 contract with DMC, which he assertedly was using to contact potential employees, had emanated from a settlement resolving alleged violations of

federal law. Therefore, Morris' priorities lacked important context.

It is axiomatic that, absent clear agreement, parties to a settlement agreement are not fungible and that responsibilities assumed in consideration of settlement are not unilaterally delegable to others. Any other result would be a mockery. Parties not individually bound to keep their own commitments can unhesitatingly agree to anything. At the time of the settlement agreement, TI had no privity with the other parties to the accord. There was no way in which the other parties, if dissatisfied with TI's performance in stated furtherance of the settlement, could have obtained specific performance. For much of the relevant time, TI did not even know of the settlement. Therefore, the remaining parties to the agreement were justified in looking solely to DMC for the accomplishment of its recorded commitments.<sup>29</sup> Although the record contains much testimony concerning Morris' efforts to communicate with persons on the two lists in order to offer jobs with TI and referral to DMC worksites, I find for the above reasons that Morris' asserted measures allegedly contractually taken on TI's behalf in claimed furtherance of DMC's postsettlement hiring obligations would be irrelevant to DMC's compliance with that agreement.

In so concluding, I further note that, in ways described above, that DMC's assignment to TI in this area was not coextensive with the obligations that DMC, itself, had undertaken when it entered into the accord.

In agreement with the General Counsel, from the timing and DMC's other conduct found unlawful, I find that DMC, in the immediate aftermath of the settlement agreement, had restructured itself to become solely a general contractor employing only project management and professional engineering personnel, had brought in TI and had created DMI, all in material part, to avoid being compelled to directly hire and employ union affiliated employees. Had the settlement been complied with, the requirement to also hire from the alleged discriminatees' list for 9 months would have had such a result. With respect to timing, DMC's June 2 contractual delegation to TI came about 8 business days after the settlement and less than 2 weeks after DMC's preceding May 19 TI contract. Before the end of that June, DMC began to shift its nonbenefited mechanical trades employees to TI's payroll. DMI was created in September and became operational on January 1, 1998.

The nicety of this arrangement was that, even after January 1, 1998, when DMI, as Dilling's satellite subcontractor, replaced DMC as the overseer of mechanical construction work on Dilling jobsites, TI remained the direct employer of those doing DMC/DMI's mechanical work.

Dilling went further to arguably "union-proof" DMC's former benefited employees transferred to DMI's direct employ. Dilling, as owner of 70 percent of DMI's stock, had sold these benefited employees, when slated for transfer to DMI, the remaining 30 percent of DMI's shares and even made them corporate directors. While many companies give their employees stock options, until after the settlement, Dilling had not. Al-

<sup>27</sup> The record reveals that during the summer of 1997, Dilling did meet three times with Union International Representative for Indiana and Ohio Jerry O'Leary to indeterminate effect, and that Chief Organizer Long had been in communication with DMC's counsel to negotiate language to be used in a posted remedial notice. Although DMC did post such a notice for the requisite period, the General Counsel and Union dispute DMC's contention that the parties had agreed to the language in that notice.

<sup>28</sup> Dilling initially, through ambiguousness, tried to convey an impression that he had discussed with O'Leary during one of their postsettlement meetings his plans to delegate future hiring to TI. However, under closer examination, Dilling conceded that while he had spoken to O'Leary about costs and the need for a pool of employees to cover DMC's fluctuating needs for nonbenefited employees, DMC never had discussed with the Union what it was doing with the settlement hiring lists. Instead, he conceded that the Union first learned of TI's involvement with DMC on June 27, 1997, from DMC's employees at the SDI jobsite in Butler who were affected by the changeover when forced either to become directly employed by TI or to be laid off that day.

<sup>29</sup> Of course, this was reciprocal and DMC had had the same rights with respect to performance by the other parties.

though DMC had been in business since 1980, Dilling, until the maneuvers of the second half of 1997, personally had retained every DMC share. For the above reasons, I find that Dilling had made these employees co-owners and directors of the newly formed DMI in an effort to insulate them from the Union.

Dilling has stated legitimate business reasons for his subsequent sole use of leased employees to do DMC's field construction work—i.e., reductions in staff, costs and obligations relating to administration, payroll deductions and workers compensation. DMC also became spared of the need to build up or reduce DMC's directly employed work force for limited periods while adjusting to fluctuating work cycles. However, while the potential for realizing such benefits from the use of leased employees may have been apparent for some time before the complaint I trial date and settlement,<sup>30</sup> such benefits had not been compelling. Dilling, as noted, did not sign a contract with TI making that company the exclusive source for DMC field personnel until the day that the trial in complaint I was noticed to begin. From the timing of what immediately followed, DMC apparently was motivated by the settlement agreement to expand TI's involvement in its affairs. During the 17 to 18 years that DMC had been in business before development of the union related risks invoked by complaint I and its settlement, Dilling had not made exclusive use of leased employees; had not abruptly transferred all of DMC's employees, benefited or not, to the direct employ of other companies; had not fundamentally restructured DMC; and had not shared stock ownership with anyone—not with family members associated with DMC or with that company's employees.<sup>31</sup>

I, therefore, find that DMC, by its above conduct since June 2, 1997, has breached the critical provision in the May 1997 settlement relating to the future hire and employment of employees covered by that agreement.

*b. DMC's joint employer status with TI*

I further conclude in accordance with the allegations of complaint II and the authority quoted below, that at all material times, DMC and TI were joint employers of employees leased by the latter to work for DMC. As noted, in exchange for a negotiated fee, TI referred such employees to DMC to work on DMC projects at DMC jobsites wholly under the direction of DMC's supervisors. No TI supervisors ever were present at those work locations. TI paid these employees, where applicable, rates negotiated with DMC; made the necessary withholding deductions from pay; provided workers compensation and all rendered job benefits. TI also disciplined and/or replaced such workers at DMC's direction/request. When DMC transferred its own nonbenefited employees to TI, DMC specifically required that TI pay those workers 25 cents/hour above the rate DMC, until then, had been paying them.

<sup>30</sup> As noted, DMC signed its first contract for TI's services in 1996.

<sup>31</sup> While a situation analogous to DMI, in the area of mechanical trades employees occurred with respect to DEC which, concurrently became the overseer of DMC's former electrical employees, DEC and electrical workers were not made a part of this proceeding. Accordingly, DEC will not be considered.

In *Special Mine Services, Inc.*,<sup>32</sup> the Board reiterated that "it will find joint employer status where it can be shown that two or more employers 'codetermine those matters governing essential terms and conditions of employment'" (citations omitted). Quoting there from its decision in *Chesapeake Foods*,<sup>33</sup> the Board held that:

The appropriate test for ascertaining joint employer status is whether two separate entities share or codetermine 'those matters governing the essential terms and conditions of employment' and to establish such status 'there must be a showing that the [alleged joint] employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision and direction.'

In finding that DMC and TI were joint employers, the above facts make clear that both companies "co-determined those matters governing essential terms and conditions of employment" of the employees TI has referred to DMC since, at least, May 19, 1997.

Although the record of this proceeding, on its face, might support the General Counsel's contention that DMC and DMI were single employers, it is not appropriate to reach this issue here. This is because the General Counsel, for reasons set forth in the transcript record (TR) of this proceeding, was found to be estopped from impleading DMI as a party Respondent.<sup>34</sup>

*c. The General Counsel's postsettlement conduct*

Apart from DMC's above role in the demise of the May 1997 resolution, there remains the noticed issue of whether the Regional Office, by not distributing DMC's undivided \$35,000.00 backpay check among the intended recipients, had so failed to keep its own recorded settlement commitment as to estop the General Counsel from alleging, as in complaint II, that DMC had violated Section 8(a)(1) of the Act by its own above conduct with respect to that accord.

DMC's submission of its backpay check for distribution to the Regional Office compliance officer in the form of an undivided, lump sum payment was in conformity with the parties' May 20, 1997, understanding as to what DMC would do in this regard. Therefore, the Regional Office's self-described unsuccessful efforts to get DMC to divide this check by substituting separate, deducted, checks to the alleged recipients, before it would make disbursement, because the General Counsel's attempts, after the event, to alter that settlement term. Since the General Counsel, during the settlement negotiations, had not been able to convince DMC to transmit its assumed monetary obligation in any manner other than by the undivided check received, the General Counsel knew, or should have known, what to expect in this regard.

The General Counsel's original decision to go along with the

<sup>32</sup> 308 NLRB 711, 715 (1992), enf. denied on other grounds, 11 F.3d 88, 144 LRRM 2950 (C.A. 7, 1993). In *We Can, Inc.*, 315 NLRB 170, 175-176, issued in 1994, the Board continued to adhere to its decision in *Special Mine Services, Inc.*

<sup>33</sup> 287 NLRB 405, 407 (1987).

<sup>34</sup> TR 77-92; 400-409. See the Board's April 20, 1999, Order denying the General Counsel's motion for special permission to appeal my ruling in this regard.

parties' desires by allocating the backpay proceeds, even if received in less than optimal form from the Employer, was logically defensible at the time. The accord, when reached, was potentially beneficial. The settlement, had it held, could have prevented a long, costly and difficult trial involving, as it has turned out, some genuine litigation risks. The arrangement would have enabled the General Counsel, as distributor, to know firsthand just when a substantial far-flung group of designated recipients would receive their backpay and in what amounts. Such compliance information, always of importance to Regional Offices regardless of settlement format, otherwise necessarily would have had to have been more indirectly obtained, perhaps piece-meal. The General Counsel's stated readiness to remain involved by distributing the agreed backpay was an important inducement to the other parties to enter into the settlement and, as the record indicates, was intrinsic to the parties' adoption of its terms.<sup>35</sup>

The General Counsel, having agreed on the record of this proceeding to disburse the backpay proceeds from a check in the amount and form received, the return of that check to DMC constituted a failure to meet that assumed settlement commitment. In reaching this conclusion it again is noted that the General Counsel's actions in this regard were completely unrelated to DMC's nonperformance of its settlement hiring and employment obligations and were contrary to the Union's expectations based on that party's understanding of the settlement terms.

Accordingly, everything else that happened to undermine the settlement occurred in a climate where the alleged discriminatees had not been paid.

The General Counsel argues that the settlement fell apart because of DMC's defaults under the settlement and not that party's own. This argument of comparative culpability is mean-

<sup>35</sup> In his brief, the General Counsel cited Sec. 10637.1 of the General Counsel's Compliance Manual in partial justification for having returned the undivided backpay check to DMC. This provision, entitled *Taxes and Withholding—Income Tax Withholding by Respondent Employers*, in relevant part, provides that:

A Respondent Employer should treat backpay as wages and make appropriate withholding of payroll taxes. An Employer is responsible for determining proper tax withholding, and for submitting proper tax reports to tax authorities as well as for providing tax reports to discriminatees to use in filing income tax returns. . . .

The General Counsel, in the context of this policy guideline, which had been in place on May 20, had ample ground during the preceding discussions for insisting that DMC submit divided, deducted checks reflecting the applicable deductions as a condition for not objecting to the non-Board settlement. However, after due consideration, the Regional Office, then, had elected not to do so. The General Counsel did not first mention the above compliance manual provision in argument, or otherwise, until in November 13, 1998, correspondence—about 1½ years after the settlement agreement was reached and approximately 15 months after that party had returned the check to DMC. Accordingly, the General Counsel's belated reliance on that provision is a rationalization after the fact. The compliance manual consists of a series of internal agency policy and procedural guidelines that do not have the force of law or of regulation. Rather, the manual's provisions become binding upon outside parties only when the General Counsel has timely applied them.

ingless. To make settlements work, each party independently must do what it had represented it would when the agreement was achieved. There is no point in speculating whether the Union would have moved to reopen this matter with the same alacrity, or at all, if it, or the recipients, had been obliged as prerequisite to further proceedings to disgorge \$35,000.00 paid and retainable solely in consideration of the settlement. While the General Counsel certainly did not match DMC in efforts taken to undercut the agreement, the General Counsel's failure to do its part was not less significant. The General Counsel is central to the system. When a Regional Office does not meet its own settlement commitments, where will it obtain the moral/legal authority to bind other parties?

As noted, the General Counsel's expressed readiness to distribute the undivided backpay check was relied on by DMC and the Union and materially induced these parties to join in the settlement. Accordingly, I find that the General Counsel is estopped from alleging that DMC had violated Section 8(a)(1) of the Act by having entered into the May 1997 settlement with no intent to comply therewith, and other such allegations.<sup>36</sup> Therefore, complaint II, paragraph 5(b), and so much of paragraph 9 as relates thereto, which relates to these allegations, are dismissed.

This estoppel finding does not detract from the above determination that DMC had promptly breached the settlement in the several ways discussed.<sup>37</sup>

#### *d. The effect of DMC's postsettlement conduct*

The argument of DMC's counsel, made in his brief, that there should be no consequences in the event that DMC is found to have breached the settlement agreement, is valid to the extent that I find that DMC, in the circumstances applicable here, has not violated the Act by contravening the settlement. However, this does not mean that its conduct in connection with the settlement was inconsequential. The gravamen of this aspect of DMC's conduct was not, per se, its breach of the agreement, but what that breach showed that it was willing to do to avoid having to hire and employ union affiliated workers after having committed to do so under the settlement preferential hiring list provisions. This prospect apparently galvanized DMC into promptly delegating its settlement hiring and employment obligations to TI; into transferring the great majority of its mechanical trades employees to TI; and into the creation of DMI, a company of stockholders and directors.

The importance of DMC's conduct here, following that found in *Dilling I* was to reestablish DMC's strong antiunion animus. This becomes germane in evaluating its other conduct alleged and, as applicable, in determining appropriate rem-

<sup>36</sup> See *J. R. Simplot Co.*, 311 NLRB 572, 574 (1993). While the *Simplot* case, unlike the present matter, related to deferral for arbitration, it set forth criteria whereby Counsel for the General Counsel can be barred by the doctrine of estoppel.

<sup>37</sup> Nothing herein is intended to have affected the tax, or other monetary, obligations of the alleged discriminatees in connection with the backpay, had it been distributed. Long testified that the Union had provided the Regional Office, among other things, with the intended recipients' social security numbers. Accordingly, the General Counsel had this information for reporting purposes.

edy.<sup>38</sup>

### *C. Facts and Conclusions*

#### 1. Independent acts of interference, coercion and restraint<sup>39</sup>

##### *a. Confiscation of union materials; threat*

In mid-February 1995, early in their most current organizing campaign, union organizers Paul Long and Malcolm Zimmer visited DMC's Fasson jobsite in the vicinity of Fort Wayne, separating on arrival in order to reach the employees who were located in two work areas. As did Long, Zimmer spoke to about six employees and gave them his business card and some union flyers.

In the welding area, Long introduced himself to Gary E. Chisolm<sup>40</sup> and to two other employees, whom Chisolm identified as Jeffrey L. Smith<sup>41</sup> and Stan Bristow. Long testified that he made the same distributions as did Zimmer, giving each of these men his business card and a union flyer. He invited them, if interested, to stop by the Holiday Inn that evening and discuss the matter further.

Long related that just as he was departing after about 10 minutes on the jobsite, DMC Foreman Eric (Rick) Colwell appeared and asked him to leave. Long replied that he did not want to interfere with work; he just had wanted to hand out some union literature and be gone. Long and Zimmer, whom Caldwell similarly had disinvited, both left.

Chisolm testified that Long had approached him while he and the others were welding. Long asked if he ever had thought about joining the Union. When Chisolm told him that he had, Long gave him his business card. He told Chisolm that he did not want to disturb him at work and asked where Chisolm was staying, promising to call him.

Long then moved on, speaking to Smith for a minute and giving him a business card. Just then, Chisolm saw Zimmer, Bristow, and Colwell appear at about the same time. Colwell told the union representatives that they needed to get out of there, they were on Dilling time. As Long and Zimmer left, Colwell entered the welding area.

As Chisolm had put Long's card in his wallet immediately upon receipt, Colwell had not noticed it. However, Chisolm testified, Colwell did see Smith put Long's card away and asked to see it. When Smith handed it to him, Colwell took the

card but did not return it.<sup>42</sup> Colwell told Smith in front of Chisolm and Bristow that he never "wanted to catch him talking to those guys again." As Colwell went by Bristow, Chisolm saw Bristow hold up what appeared to be a business card,<sup>43</sup> which Colwell took as he passed.

As Smith recalled, Long and Zimmer first visited the Fasson site, where DMC was installing a boiler, in the spring of 1996. This was before there had been any union meetings. When Long and Zimmer arrived, Smith was welding; Chisolm and Bristow were about 15 feet away. Long told Smith that if he was interested in organizing, to let him know and handed him his business card. Smith could not see or hear what Long said to the other employees.

Smith related that Colwell came onto the scene after Long and Zimmer had left the immediate work area but still were visible in the distance. In response to Colwell's query as to who those guys were, Smith said that they were organizers from the Union. Colwell asked if they had given Smith a business card, telling Smith that it would be a good thing not to join the Union and to throw the business card away. If Smith did not want to throw the card away, Colwell would. Smith gave Long's card to Colwell who left with it. Smith did not see Colwell talk to Chisolm or Bristow. After Colwell was gone, Smith returned to work.

That evening, according to Long and Zimmer, Chisolm and another employee met with them at their hotel, as invited. Chisolm told the union representatives that Colwell had been very upset that they had been to the site. Colwell had gone around asking everybody to give him the business cards and union literature that Zimmer and Long had given them. Chisolm continued that Colwell had taken away everything that Long and Zimmer had handed the men and that he may have gotten two business cards; but, "They didn't get this one." Chisolm then produced Long's card. These organizers related that Chisolm had informed them that Colwell had told the employees that there was not going to be a union at Dilling and that anybody who talks to these organizers is going to be fired.

Long and Zimmer then discussed the benefits of belonging to the Union with Chisolm who later became a member.

From the unrefuted testimony of Chisolm and Smith, I find that DMC, by Colwell's confiscation of the union literature from Smith and Bristow, violated Section 8(a)(1) of the Act.<sup>44</sup> While there was some difference in detail between the accounts of Chisolm and Smith, both agreed that Colwell had expropriated the business card that Long had given to Smith. In addition, Colwell's concurrent statement to Smith, in the presence of the other employees, to the effect that Smith should never let Colwell catch him talking to those union organizers again, constituted a threat of unspecified reprisal should Smith or the other then-present employees continue to engage in union activities.<sup>45</sup> This threat, made while Colwell was expropriating

<sup>38</sup> Special Mine Services, 308 NLRB, supra, at 711.

<sup>39</sup> Alleged violations of Sec. 8(a)(1) of the Act directed against alleged discriminatees will be considered in connection with the discussion concerning those individuals.

<sup>40</sup> Chisolm, with 17 years prior experience, was employed by DMC as a fitter welder from 1994 to early 1995. From November 1994 until mid-February 1995, he was employed at DMC's jobsite in Fasson.

<sup>41</sup> Between June 1994 and the summer of 1996, Smith worked on three DMC jobs, all in the Fort Wayne area. Smith was employed at DMC's Fasson and Silberline sites in February 1995 and March 1996, respectively. Smith testified concerning the Fasson incident described by Long, Zimmer, and Chisolm, and as to other alleged violations. Smith, however, was an uncertain witness, retreating during cross-examination from various original assertions. Accordingly, I have credited Smith's testimony where his accounts were not contradicted or were confirmed by other witnesses.

<sup>42</sup> Smith did not ask for the card's return.

<sup>43</sup> Chisolm did not see how Bristow had obtained Long's business card. Neither Bristow nor Colwell testified concerning the confiscation incident.

<sup>44</sup> See *Vemco, Inc.*, 304 NLRB 911, 927 (1991), enfd. in rel. part and remanded in part 989 F.2d 1468, (6th Cir 1993).

<sup>45</sup> *Tomco Carburetor Co.*, 275 NLRB 1, 4 (1985).

these employees' union materials, was violative of Section 8(a)(1) of the Act.<sup>46</sup> The organizers' further testimony that Chisolm, when visiting their hotel during the evening after this incident, also had told them that "there was not going to be a union at Dilling and that anybody who talks to these organizers is going to be fired," was not alleged in complaint I, was not included in Chisolm's testimony and was hearsay. Accordingly, I make no finding based on that attributed statement.

*b. Jeffrey L. Smith's conversations with Beecher and Dilling*

Smith further testified that, in the early spring of 1996 while he was working at DMC's Silberline job in Decatur, that Company's Area Superintendent, Stan Beecher, made his weekly visit there. According to Smith, on that occasion, while he and Beecher were riding together in Beecher's truck on their way to lunch, Beecher asked if Smith was going to join the Union. Smith replied that he was. Beecher then told Smith that Dilling had a lawsuit against Local 166 and, with that lawsuit, Local 166 no longer would be able to operate. At the time, Smith, as had been his daily custom, was wearing union insignia on the job.

On cross-examination, however, Smith changed his story. Contrary to his direct testimony that Beecher had initiated this conversation with him in his truck about joining the Union, Smith related that he first went to see his immediate supervisor, Colwell, because he learned that the Union had sent DMC a letter naming Smith among other employees there listed as members of the Union's organizing committee. This had caused Smith to become concerned about his job<sup>47</sup> and to initiate conversations with members of management on the matter of joining the Union. Smith had told Colwell that he did not want to lose his job over the organizing deal. Smith admitted that he had had this worry even though he conspicuously had worn union insignia to work each day.

Smith also conceded that he had initiated more than one conversation with Beecher as he struggled with his decision as to whether to go union. In these conversations, he had sought Beecher's advice, having been told to join the Union by an uncle who also was on the organizing committee. Smith recalled having had one such conversation with Beecher in the latter's truck on the way to work. Beecher, in turn, had told Smith it was up to him to decide which way to go; that he thought that Smith was a good worker; and that DMC had a lawsuit against Local 166 which would result in that union no longer being able to operate. Smith denied that Beecher had told him not to join the Union.

Since the record makes clear that Smith, while openly wearing union insignia, took repeated initiatives to speak with Beecher and Colwell about his relationship with the Union and that, on more than one occasion, he had approached Beecher for advice as to what to do about the Union, I find that Beecher

did not violate Section 8(a)(1) of the Act by interrogating Smith about the Union, as alleged. It is noted that neither Beecher nor any other DMC supervisor ever had spoken to Smith about his daily display of union insignia at work.<sup>48</sup>

Smith further averred that in March 1996, a few days after his above incident with Beecher, DMC president Dilling started a conversation with him also at the Silberline job. Smith stated that Dilling had told him that he wished he had known that "we" wanted to join the Union. If Smith wanted to join the Union, Dilling could help him; he would refer him to quality contractors. Dilling knew guys who were in the Union "who could help us out." Dilling told Smith that he wanted dedicated people who would tell him if anything unsafe was happening on the job; if guys came back late from lunch; arrived late. Although Dilling testified at length at the hearing, he did not speak to this incident described by Smith. The General Counsel, citing *Walter, et al., Macy, d.b.a. 7-Eleven Food Store*,<sup>49</sup> correctly contends that Dilling's remarks, in violation of Section 8(a)(1) of the Act, created an impression that Smith's union activities were under surveillance. In *7-Eleven Food Store*, supra, the Board noted that its test in determining whether an employer has created an impression of surveillance is "whether employees would reasonably assume from the statements or actions in question that their union activities had been placed under surveillance." From Smith's uncontradicted account, I find that Dilling's March 1996 comments to him met that standard and that, therefore, DMC, through Dilling, violated Section 8(a)(1) of the Act.

However, contrary to the General Counsel's argument in his brief that the above conversation also constituted coercive interrogation, since there is no evidence that Dilling, however facetious he may have been in creating an impression that he was observing Smith's union activities, actually had asked Smith anything, Dilling had not asked if Smith wanted to join the Union, or his opinion of same, and Dilling's stated desire for workers who would report to him concerning unsafe conditions and latenesses of other employees was too generally phrased to constitute a request that Smith furnish such information. Therefore, I do not find that Dilling had interrogated Smith in violation of Section 8(a)(1) of the Act. As noted, Smith had been quite open about his union sentiments. He had worn union paraphernalia at work each day and had been identified to DMC in union correspondence as a member of its organizing committee.<sup>50</sup>

*c. Coercive interrogation in 1997*

Brothers James L. and Thomas R. Hankins<sup>51</sup> respectively

<sup>48</sup> *Rossmore House*, 269 NLRB 1176 (1984).

<sup>49</sup> 257 NLRB 108, 116 (1981).

<sup>50</sup> While the relevant allegation in complaint II asserts only that Dilling had engaged in unlawful interrogation and not that he had created an impression of surveillance, the violation found herein, I conclude that the violation established was of the same class as the violations alleged in the charge; that it arose from the same factual situation; and could be countered by a similar defense. *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988).

<sup>51</sup> The Hankins brothers, both journeymen fitters welders from Louisiana with extensive experience, had two periods of employment with

<sup>46</sup> Although Smith did not specifically confirm Colwell's above threat, Chisolm's recollection of detail was superior to Smith's. Colwell did not testify at the hearing.

<sup>47</sup> In his original testimony on this point during cross-examination, Smith had denied knowing of the Union's letter describing him as an organizing committee member, but later admitted that this awareness had been the basis for his anxiety.

first went to work for DMC at its SDI jobsite, Butler, during the last week of February 1997 and the first week of March 1997. Their brothers-in-law Billy Clark and Scott Halley worked with them there. While on that project, the four men stayed at a motel in Fort Wayne.

James Hankins was approached by Union Organizer Jeffrey E. Jehl in the parking lot of the Hankins' motel on around March 18, 1997, as he, his brother and brother-in-law, Clark, were leaving their vehicle after returning there at the end of the day. This occurred about 3 weeks after he had started to work for DMC. While Thomas Hankins and Clark went to their rooms, Jehl told James Hankins of the Union's organizing campaign and asked if he was interested in joining the Union. When James joined his brother in their room to discuss Jehl's overture, they expressed a shared concern that they might have to leave their jobs at DMC because, as members of a sister local, they had not obtained their jobs through the Union. They worried about facing possible \$500 union imposed fines and about causing bad relations between the two sister locals.

At work the next morning, as Foreman Lenis Pipkin passed by, the Hankins brothers volunteered to him that a union organizer, whose name they could not remember, had spoken to them about an organizing campaign going on at SDI and had asked if they would be interested in joining the Union. At the time, DMC had about 20 employees employed at its SDI site. Around an hour later, Pipkin, Colwell, and Area Superintendent Stan Beecher gathered at the Hankins brothers' work area.

Beecher told the brothers that he understood that they had a visitor at their room the night before. He asked if anybody had said anything. Both Hankinses replied that they had. Beecher wanted to know the guy's name. James Hankins had a business card but could not find it in his wallet; he had left it in his room. Beecher wanted to know the type of car the organizer had been driving and was told it was a Buick. James Hankins declared that he had a funnily-spelled last name. Beecher asked if his name was Jeff Jehl. James replied that was it. Beecher told the brothers, "Look, I don't care what you do, but let me tell you how stupid these guys are. Jeff Jehl, the guy that visited you last night, busted a drug test when he come out here to SDI.<sup>52</sup> Also, we have a lawsuit that we won against them for stealing our trash, trying to get employees' names. . . . dumped it in a motel dumpster and the motel called us, and then we come and turned it over to judge. . . . They'll do just about anything to get our people. Last year they got three of our guys, and all three of them are unemployed."

The Hankins brothers decided to leave DMC's employ 3 days later, after Pipkin had asked Thomas Hankins if he was union. Hankins admitted that he and his brother were members of a pipeline local. Pipkin replied that he had thought that they were union; they did real good work.<sup>53</sup>

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DMC. Both were members of Pipeliners Local 798, Tulsa, Oklahoma, a sister local union to Local 166, the Union, when they first applied to work for DMC.

<sup>52</sup> Beecher's reference was to when Jehl had applied for a tiling job with DMC.

<sup>53</sup> Although Thomas Hankins' testimony to some degree contradicted that of his brother in that Thomas recalled that Pipkin had asked if he was a union member on March 19, while James remembered that

The first thing the next morning, March 24 or 25, James and Thomas Hankins told Pipkin that they were union and that would be their last day. Pipkin "grabbed his side radio" and said, "Rick, we've got a problem. You better get over here ." When Colwell arrived in about 10 minutes, Pipkin told him that James and Thomas Hankins were both union and that this would be their last day. Colwell, too, told the brothers that he had thought that they were union because of the work that they had done. James Hankins responded that they needed to go; that they were members of a union; that they did not want to cause bad relations between the locals; and that they could get into trouble for working there and each be fined \$500 by their local if it found out that they had not gotten their jobs through the union. The brothers explained to Colwell that they were members of a pipeline local and, although members of the same Plumbing and Pipefitting International Union, they did a different kind of work than was done by the regular building trades local unions. James Hankins did not know about being on a building trades job; it never had happened before. Colwell answered that he understood because he used to be in a union and his brother was in a union in Seattle. Colwell wished that the Hankins brothers would stay. Thomas Hankins at first suggested that, perhaps, if they went to a different motel, they would not have any more trouble. Colwell reiterated that he wanted them to stay; they were top hands. They were getting more work done than anybody else and the Company needed them. The Hankinses asked if DMC would give them layoffs. Colwell did not know; he would have to ask (Project Manager) Gerry Bunn or Beecher.

Colwell returned about an hour later, telling the brothers that he had just gotten off the phone with Bunn who had said that he had a job in South Bend and that the Company would hide them from the Union up there. The Hankinses declined the offer and were given layoff status.

However, in mid-April 1997, the Hankins brothers returned to DMC's SDI jobsite at Jehl's request. Jehl had called them asking that they return to work for DMC and to help in the Union's organizing campaign there. At first, James Hankins was not responsive to Jehl's request, but when certain other plans and jobs then contemplated fell through, he called Jehl and told him that they both were interested.

According to the Hankins brothers, DMC supervisors Colwell and Bunn, whom the Hankinses had called about returning to work there, remembered them as good workers. Accordingly, the brothers rejoined DMC where they continued to work, essentially without incident, until June 27, 1997,<sup>54</sup> when,

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event as having occurred about 3 days later, I accept James Hankins' account on this point as most consistent with the overall course of events. Had the matter of their union membership been made known to management on March 19, their initial employment there might have climaxed sooner than it did.

<sup>54</sup> James Hankins related that Colwell had been friendly to him after his return, talking to him about a variety of topics. This changed about 3 or 4 days before his employment came to an end when he, his brother and Scott Halley began to wear blue shirts to work which bore the legend "Vote Union" or "UA Yes." After they wore those shirts to a safety meeting, Colwell did not again speak to James Hankins during his last 3 days on the job.

as noted, DMC transferred its nonbenefited employees at that location to TI's payroll. The Hankinses and certain other employees refused to go to TI and were laid off at the end of that day.

In agreement with the General Counsel, I find that Beecher's March 19 questioning of the Hankins brothers about whether they had been visited earlier by a union representative, about the organizer's name, and about the type of car the organizer had been driving, in the context of accompanying remarks disparaging Jehl and the Union he represented, violated Section 8(a)(1) of the Act. In so concluding, it is noted that on the day in question, DMC's officials did not yet know that James and Thomas Hankins were union members or even sympathetic to unions. The Hankinses' initiative in just telling Pipkin that one of them had been approached by a union representative did not open the door to their being suddenly surrounded and questioned in detail about that visit by two supervisors and an area superintendent, Beecher. This disproportionate Employer interrogation/reaction, which included Beecher's antiunion statements, was calculated to chill union support.

*d. Morris' alleged unlawful June 1997 statement*

The General Counsel alleges that, on about June 27, 1997, the day of DMC's transfer of its SDI employees to TI, TI's representative at the event, Morris, had unlawfully informed these employees that DMC was using TI in order to avoid hiring union members.

John Hansen, an employee at DMC's Ashley site at the time of the June 30, 1997, transfer<sup>55</sup> and a union supporter, testified concerning this allegation. According to Hansen, who described a generally followed pattern, the Ashley employees—Hansen and Dino Whittaker—were directed by their supervisors to go to the office, where they met with Beecher, their DMC foreman, Tom Woodward, and Morris. Beecher informed the employees that everybody was laid off and, if they wished to continue working, they could hire on with TI. In turn, everybody would receive a 25 cents/hour raise.

While Hansen and Whittaker were filling out employment applications to TI, given to them by Morris, Hansen testified that Whittaker asked Morris if this all was to cover Dick's (Dilling's) butt with the Union. Morris replied that it helps to cover his back door. Morris then proceeded to talk about TI's benefits package and to distribute a booklet outlining TI's policies affecting its employees.

As Morris recalled the incident, when Whittaker asked him at the time of his hire by TI if this all was to cover Dick's butt with the Union, or words to that effect, he replied that Mr. Dilling makes his own business decisions; that this was his decision as to how he wanted to do business in the future; and that "we're" going to be a part of it. Morris denied having said anything to the effect that TI's working with Dilling was helping to "cover his back door."

Morris pointed out that he had hired Hansen and Whittaker on the spot although Hansen, at the time, was wearing a union t-shirt, hat, and pins.

<sup>55</sup> DMC's Ashley employees were in the second group, after SDI, to be moved to TI.

I credit Morris' account of this interchange because it appears to be more consistent with the overall pattern of events and logical. DMC had just become a major TI client whose needs were to consume much of Morris' time in the months ahead. TI had negotiated a special contract and pay rate with DMC; Morris met regularly with Dilling; and, in the new contract just signed that month, there was a requirement that TI, through Morris, as it turned out, would be required to hire from two lists appended to that agreement and to offer hiring priorities to employees laid off in the transfer. TI also then was in the process of hiring most of DMC's work force. The point is that Dilling was a major TI client and, accordingly, Morris' version of his response to a transient employee's query about Dilling using TI to "cover his butt with the Union" would be more consistent with TI's interest in establishing and maintaining its relationship with Dilling.

For the above reasons I do not find from the adduced evidence that the Respondents, through Morris, had violated Section 8(a)(1) of the Act by informing its employees that DMC was using TI in order to avoid hiring union members.

*e. Miscellaneous conclusions concerning interference, coercion and restraint*

Since no evidence was presented to support allegations in complaint I that DMC Foreman Jim Fulford, in mid-June 1995 at the SDI jobsite, or at any other time or place, respectively had interrogated DMC's employees concerning their union membership, activities and sympathies, and those of other employees, and/or had created an impression among such employees that DMC was keeping their union activities under surveillance, I find that Section 8(a)(1) of the Act was not violated in those respects.

Also, in the absence of any supporting evidence for the relevant allegation in complaint II that asserted DMC supervisor Don Whittaker, Sr.,<sup>56</sup> in June 1997 at the SDI project, or at any other time or place, had informed employees that DMC did not want to hire any union members, I do not find that that Section 8(a)(1) of the Act was so violated.

**2. Alleged unlawful discriminatory conduct affecting individual employees—facts and conclusions**

*a. Conduct affecting Kevin Sexton*

**(1) The allegations concerning Sexton**

The General Counsel contends that DMC unlawfully sent its employee, Kevin Sexton<sup>57</sup> home with instruction to remove the union t-shirt he had been wearing and to return to work in clothing which did not display the Union's insignia. The General Counsel further asserts that Sexton thereafter was laid off for 1 week because of his union activities and that DMC's

<sup>56</sup> DMC did not concede Whittaker's supervisory status, contending that he was a nonsupervisory leadman. However, the absence of evidence that Whittaker had engaged in any substantive conduct violative of the Act rendered that issue moot.

<sup>57</sup> Sexton was employed by DMC as a fitter welder from September 1995 through late May 1996, when he voluntarily left that Company's employ. While with DMC, he worked at three jobsites, including its Guardian Glass project.

stated reason for the layoff, that Sexton had been so penalized under its progressive disciplinary system for repeated latenesses, was pretextual.

While conceding that Sexton had been sent home to change into clothing that did not show union insignia, DMC contended that it had acted only on orders from its customer on that job and that it had no work rule against its employees wearing union paraphernalia at work.

(2) The direction to remove union insignia

The record shows that in about March 1996, about 3 weeks after Sexton had started to work at DMC's Guardian Glass job in Auburn, DMC Foreman Douglas Sanders approached him at his workplace and told him, "Listen, you're not allowed to wear union activity t-shirts in Guardian Glass. It's their policy. You need to go home and change your shirt and come back." Sexton complied with this directive.

Sexton had been active in the Union's efforts to organize DMC's employees since about February 1996, having attended union meetings and openly worn union insignia on his hat and t-shirts at work. On March 9, 1996, Union Organizer Long sent a letter to Dilling confirming that United Association Local #166 and the Indiana State Pipe Trades were involved in organizing DMC's mechanical trades employees and that three named individuals were on the organizing committee for DMC's Fort Wayne office.<sup>58</sup> Long cautioned Dilling against committing an unfair labor practice in the course of its campaign lest charges be filed with the National Labor Relations Board. On March 11, 2 days later, Long sent Dilling a like letter in which he had added the names of Sexton and Jeffrey Smith to the list of those previously identified as being members of the organizing committee.

Beecher testified that, before approaching Sexton on this matter, Sanders had reported to him that Larry Benz of Guardian Glass had told him that there was a problem with the t-shirts that two of DMC's employees were wearing; that union paraphernalia was not allowed on the Guardian jobsite or in the Guardian plant area; and that these employees either would have to go home and change or they would have to leave the jobsite. Beecher instructed Sanders to explain to Sanders and Smith<sup>59</sup> that this was a Guardian Glass, and not a Dilling, policy.

Sexton related that, although he had worn the union logo on his garments in the presence of supervisors during 3 weeks at DMC's Silberline job and for 2 weeks at Guardian Glass before this incident, no one in authority at DMC had spoken to him about that practice or had told him to change into clothing that

did not have union emblems.

In *Dews Construction Corp.*,<sup>60</sup> the Board, in relevant part, found that both a general contractor and its subcontractor were jointly and severally liable for a subcontractor's discriminatory action against one of its employees, taken at the general contractor's direction, because of that employee's union activities. The Board there noted that:

An employer violates the Act when it directs, instructs or orders another employer with whom it has business dealings to discharge, lay off, transfer, or otherwise affects the working conditions of the latter's employees because of the union activities of said employees (citations omitted).

Therefore, the unrefuted evidence that DMC had sent Sexton home to remove the union t-shirt he had worn to work, a violation in itself,<sup>61</sup> only because Guardian Glass had directed it to do so, not only does not provide a defense to DMC but also could have implicated Guardian Glass jointly and severally had that company been named as a Respondent in this proceeding. Since Guardian Glass is not a party, I find that DMC independently violated Section 8(a)(1) of the Act when it sent Sexton home to change to clothing that did not bear union insignia.

(3) Sexton's suspension

The record shows that on March 22, 1996, after about 3 weeks there, Sexton was suspended from DMC's Silberline project for 5 work days because of lateness. At the job in question, work started at 6 a.m.<sup>62</sup> and, on Mondays through Thursdays continued to 4:30 p.m., and until 2:30 p.m. on Fridays. DMC contends that, on the day Sexton was so suspended, his third such infraction, as counted, he had reported in at 6:04 a.m.

Sexton testified that he had driven himself to work on March 22, arriving at the jobsite at 5:58 a.m. According to Sexton, Area Manager Jack Koehne<sup>63</sup> and employee Jeffrey Smith were walking in just as he arrived. As Sexton entered the jobsite, Koehne told him, "Kevin, you are late." Sexton replied, "No I'm not. I'm two minutes early," to which Koehne retorted, "By my watch, you're late." Sexton asked, "Whose watch do we go by?" Koehne answered by his watch. Koehne told Sexton to go home for a week and to call him in the middle of the week and that Koehne then would tell him where to go. Sexton explained that this prospect of reassignment to another job was germane because the project that they were working on was nearly completed.

On the DMC Employee Warning Report, issued that date, Koehne wrote in the "Company Statement and Details" section that:

Kevin did not appear for work until 6:04 a.m. The job start time was and is 6:00 a.m. I reminded Kevin that 6:00

<sup>58</sup> One of the individuals named in this letter, Randall Collins, is also an alleged discriminatee in this proceeding.

<sup>59</sup> Beecher, the only company witness to testify concerning this incident, also identified another individual, Smith, not alleged in this regard in the complaint as having been sent home at the same time and for the same reason as Sexton. Both men agreed to go home to change their shirts and, according to Beecher's uncontradicted testimony on this point, they were paid for the time spent doing this. Since Smith did not testify concerning this incident, and as the General Counsel has made no argument involving Smith on this matter, no finding in this regard is made concerning him. Nevertheless, this issue still is effectively addressed in the remedy afforded Sexton.

<sup>60</sup> 231 NLRB 182, fn. 4 (1977), enf'd. 578 F.2d 1374 (3d Cir. 1978), supporting 246 NLRB 945 (1979).

<sup>61</sup> See *Northeast Industrial Service Co.*, 320 NLRB 977 fn. 1 (1996).

<sup>62</sup> On other DMC jobs, the starting time was 7 a.m.

<sup>63</sup> Koehne, who then usually oversaw DMC's Fort Wayne area, was substituting for Colwell, Sexton's regular supervisor on that job, who had to be away from the jobsite on a day when Beecher could not cover for him.

a.m. was the time to start work and not the time to show up. Since this was his 3rd violation, he was informed that he was to be suspended five (5) days starting today (Fri.-3/22/96). He agreed that he knew what the discipline action was coming.

In the lower part of the Warning Report reserved for the "Employee Statement," Sexton had checked a box indicating that he disagreed with the company statement, noting as follows:

I got to work at 6:01 by my watch, which is 3 min. fast. How can you justify being one minute late. Whose watch do you go by. I feel that the only reason I was sent home is because of the union deal that is going on.

In the above regard, Sexton testified that he deliberately had set his watch to run 3 minutes fast to provide himself with a personal reminder and margin against being late. Accordingly, if his watch had indicated 6:01 a.m. when he reported to work on March 22, the actual time had been 5:58 a.m. He also conceded that, until then, the times shown on supervisors' watches customarily had governed disputed issues of punctuality.

The record reveals that an employee warning report issued by Beecher only the day before, March 21, showed in the "Company Statement and Details" section, that on March 15, 1996, "Kevin was late to work. He already had a verbal warning in his file, dated 2-21, from Gerry Bunn." In the "Employee Statement" section, Sexton merely had checked his agreement, without comment.

Sexton also admitted that earlier, in February 1996, while receiving welding training at DMC's Logansport facility, he had been late to such training on "at least two occasions." On February 21, Gerry Bunn had told Sexton that he should not be late; that Bunn wanted him there on time; that he should not let it happen again; and that there were a lot of guys who would like to have Sexton's job.

Sexton, further, conceded that he had known of DMC's work rules, which had been set forth in the handbook he received when he began to work for DMC. These rules provided for a verbal warning for the first infraction;<sup>64</sup> a write-up slip for the second; a 5-day suspension without pay for the third offense; and termination for the fourth.

Sexton agreed that, having been late "at least twice" in the preceding February and once earlier that March, if he had been late on March 22, it would have been his fourth lateness and his suspension would have conformed to the work rules. However, Sexton asserted that he had not been late. His own watch, as noted, set ahead by 3 minutes to show 6:01 a.m., indicated that he actually had arrived for work at 5:58 a.m.

From the above evidence, notwithstanding that the General Counsel's proof in his direct case that Sexton had been an active, open union supporter who had been unlawfully sent home to change out of clothing that displayed the union insignia he

regularly had worn to work, and that he previously had been identified to management by the Union as a member of its organizing committee, all in the context of DMC's established antiunion animus, the preponderance of the evidence does not support a finding that he was suspended on March 22, 1996, because of his union activities. Rather, DMC, from the weight of the presented data, has shown that Sexton, in any event, would have been suspended in accordance with the progressive disciplinary system in DMC's work rules for having been late more than three times. Sexton, before March 22, admittedly had been late "at least" twice in February and once on March 15 and that Bunn previously had cautioned him rather firmly for one of these latenesses. Accordingly, the legal propriety of the March 22 suspension turned on the disputed question of whether he actually had been late on that date.

If as Sexton testified when he confronted Koehne on March 22, that he had set his watch to run 3 minutes ahead of the actual time, then his own timepiece had then indicated that he was 1 minute late. Therefore, from what Sexton's own watch then showed, he was reduced to arguing when charged with lateness either that his personal watch was not showing the correct time or that, although tardy, he was not quite as late as Koehne was contending. Accordingly, even apart from the practice that company officials' timepieces determined issues of tardiness, Sexton could not have used his own watch at the time of the controversy to cause Koehne to reconsider his observation that he had arrived late. Accordingly, noting that on March 22, Sexton had "at least" four prior recorded incidents of tardiness, I find that Sexton was suspended for lateness in accordance with the Respondent's established progressive disciplinary system and that DMC did not violate Section 8(a)(3) and (1) of the Act in this regard.<sup>65</sup>

#### *b. The discharge of Randall S. Collins*

The General Counsel and Union contend that Randall S. Collins<sup>66</sup> was terminated in April 1996 because of his union activities and sympathies and that DMC's contention that Collins had been discharged because of his refusal to take a mandatory drug test was pretextual.

As described by Dilling and Shirley Ott, DMC's personnel director and Dilling's niece by marriage, DMC operated under a requirement imposed by its insurance carrier to ensure a drug free workplace environment. Accordingly, DMC enforced a published Drug/Alcohol Abuse Policy which subjected employees to disciplinary action if, during working hours, they brought illegal drugs or alcohol onto company premises or

<sup>65</sup> See *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *Transportation Management Corp.*, 462 U.S. 393 (1983).

<sup>66</sup> Contrary to the General Counsel's contention that Collins, who had worked for DMC as a pipefitter welder, never had been disciplined, the record shows that Collins' initial employment with DMC, from October 1992 to the fall of 1994, had ended with his termination for throwing company tools and walking off the Central Soya work site, Decatur, in the middle of a job. Koehne rehired Collins in late February 1995 and Collins continued to work for DMC at various jobsites until his disputed April 1, 1996, discharge. DMC's only disciplinary action against Collins after he returned from his first termination was a written verbal warning from Beecher concerning his productivity.

<sup>64</sup> The verbal warning was often registered in writing as a means of recording that it had been administered. Dilling testified that, before commencing the actual progressive disciplinary process, it had been his Company's policy to try to work with employees, initially giving them "freebies."

property; if they had possession of, or were under the influence of illegal drugs;<sup>67</sup> or if they engaged in conduct relating to the use, manufacture, or distribution of illegal drugs. In this policy document, DMC reserved the right, at its discretion, to test for drugs and alcohol, including in the following situations set forth below in relevant part:

1. Post Employment Testing

All employees upon hire, will be required to voluntarily submit to a urinalysis test and sign a consent agreement which will release DMC from liability. . . . Continued employment at DMC will be contingent on the result of urinalysis.

2. Post Accident Testing

Any accident occurring while on Company business that results in injury (requiring medical treatment) to an employee or others and/or damage to Company property will require a drug/alcohol screening. . . .

3. Random Testing

. . . . all employees are subject to random, unannounced drug/alcohol testing at any time the Company deems necessary to ensure a DRUG FREE work place.

4. Return to Duty Testing

Any employee who has been removed voluntarily or otherwise from his/her job assignment due to drug or alcohol abuse, must agree to be tested randomly as well as upon return to work.

\* \* \*

Disciplinary Actions

Dilling Mechanical Contractors reserves the right to use disciplinary actions up to and including termination of employment upon violation of company policy.

Pursuant to the above policy, DMC employees signed forms agreeing to such testing. The form signed by Collins on February 23, 1995, when he returned to DMC's employ, read as follows:

VOLUNTARY CONSENT AND WAIVER TO  
SUBMIT TO A  
DRUG/ALCOHOL TEST

I, Randall S. Collins, as an applicant/employee of Dilling Mechanical Contractors, Inc., do hereby consent to a drug and/or alcohol test to be given to me without any notice. I further consent and agree that a drug and/or alcohol test can be given to me at the discretion of said employer. I understand that I may have some legal and/or equitable rights to object to such tests, but that I hereby waive those rights as a condition of employment with Dilling Mechanical Contractors, Inc.

Dilling testified that any employee who refused to take a drug test when requested would be promptly terminated. In this connection, on September 25, 1995, an employee whom Beecher suspected of smoking marijuana on the job, because of the indicative smell of the smoke and his "erratic behavior,"

<sup>67</sup> Being "under the influence" was defined in the policy document as the presence of a drug and/or alcohol in the employee's system at the time of testing.

was asked to take the drug test. The separation notice issued that day noted that the employee had "resigned rather than take drug test."

In addition to the above incident, the record shows that from September 18, 1995, to October 10, 1996, DMC discharged six employees for drug test related reasons. Of these, five were terminated for having tested positively for at least one illegal substance.<sup>68</sup> Two of the five discharges had tested positive during preemployment drug screenings and one had tested positive during a postaccident drug examination. The sixth dischargee, whose situation was closest to Collins, having gotten something in his eye while on the job, had been referred for treatment to RediMed. RediMed was the Fort Wayne clinic which DMC's insurance carrier had designated as the authorized care provider, and the one DMC most used for its employees. This sixth dischargee was terminated that day, September 18, 1995, for having refused to take a drug test there.<sup>69</sup>

The record shows that on January 17, 1996, while Collins was employed by DMC at its Maple Leaf Duck Hatchery site, Ligonier, he injured his left arm and shoulder while ascending a ladder carrying a steel beam to be placed on a bulkhead. Collins had lost his footing on the ladder, made slippery from the wet flooring below, catching his arm and extending his shoulder.

Collins testified that he reported his injury to Beecher who told him that, if he wanted, he could go to the hospital to have a doctor look at his condition and to have x-rays made. Collins responded that he felt that RediMed was not a place for serious injuries and that he wanted to go to a hospital. Beecher agreed without specifying any hospital for Collins to use. Accordingly, Collins drove himself to Parkview Hospital, also in Fort Wayne, because it was closest to his home in that city.<sup>70</sup>

At Parkview, Collins' initial diagnosis had been for a strained shoulder. X-rays were negative.<sup>71</sup> Accordingly, Collins went home and returned to work the next day. Within a week after his injury, Collins, then assigned to the Guardian Glass site, Auburn, called Beecher to let him know that he was back at work. Beecher told Collins to take it easy and "we'll see how your shoulder goes." Beecher reassured him that it could be just bumped up or be a little strained, which might take a couple of days to heal. However, when during the next 3 to 4 days the pain got worse, Collins again called Beecher and re-

<sup>68</sup> One such discharged employee had tested positive for two illegal substances.

<sup>69</sup> While these promptly administered drug test related discharges indicate the seriousness with which DMC regarded the matter of mandatory drug testing, they do not appear to support Dilling's further testimony that it was DMC's policy to work with and to try to rehabilitate individuals who tested positive.

<sup>70</sup> While RediMed also was about two miles from his residence, Collins related that he had preferred not going there for diagnosis because he had been poorly served there in connection with a 1990 injury. At that time, after a prolonged wait for attention to his "serious injury," he had been sent to a hospital because RediMed had not been capable of helping him. Collins did not describe RediMed as a hospital but, rather, as a place to get physicians' care for scrapes, bumps, bruises, colds and flus, when the patient's regular doctor was not available.

<sup>71</sup> DMC did pay for Collins' treatment at Parkview Hospital even though it had not been required to do so since RediMed was the insurer specified care facility.

ported that he had to see a doctor; that the pain was killing him. Beecher sent him to see the physicians at RediMed.

The January 26, 1996, RediMed physician's report on Collins sent to DMC indicated that he was to do minimal arm work and only occasionally lift more than 40 pounds. Collins returned to work for DMC under these restrictions, while continuing to go to RediMed for therapy. Collins' March 11, 1996, RediMed diagnosis report showed left rotator cuff tendonitis/strain. He was to continue present restrictions and treatment. Collins was not tested for drugs or alcohol at either Parkview Hospital or at RediMed in connection with his January 1996 injury.

The RediMed physician's report for Collins, dated March 15, 1996, was more specific. Again referring to the above diagnosis of strain and impingement of left rotator cuff, it noted the following restrictions on Collins' work activities: occasional lifting of 26–40 pounds and pushing/pulling and work around moving machinery; but no lifting above left shoulder. The report noted that Collins could not reach with the left arm above his shoulder.

In February 1996, Collins became involved in the Union's campaign to organize DMC's employees. On February 18, Collins attended his first union meeting with other employees, including Jeffrey Smith and Kevin Sexton. The meeting was conducted by Long and attended by Zimmer and other union officials. After discussion of the Union's wage and benefits package, Collins and others signed union authorization cards that night. In the time that followed, Collins attended several other union meetings where, in March, he was given union t-shirts, stickers, logos and memorabilia. Collins testified that, after receiving these union items at a meeting held around March 11, he wore the union t-shirt to work, attached the stickers to his welding hood and showed the union's logo on his tool box. Collins' foreman, Paul Beecher, Area Superintendent Stan Beecher's brother, observed these displays. In Long's above March 11, 1996, letter to Dilling, Collins was listed among the members of the union organizing committee whom Dilling was warned about discriminating against.

DMC, contending that Collins had been engaged in organizing when he should have been working, also recorded his union activities. A March 12, 1996, incident report signed by DMC foreman Paul Beecher, noted that:

On March 12, 1996, at 7:10 a.m., Randy Collins handed (employee) Ryan Constable a business card from Paul Long with instructions to call Paul Long. Ryan told Randy that he was not interested.

Later that same day, Paul Beecher prepared another Incident Report recording that:

On March 12, 1996, between 3:00 p.m. and 3:15 p.m. Randy Collins discussed with Ryan Constable the possibility of Ryan joining the union. Ryan himself brought this to the attention of the job foreman himself. Again Ryan told Randy that he was not interested in joining or discussing the union.

A March 14, 1996, employee incident report signed by

Donnie E. Whittaker<sup>72</sup> re Collins related that:

Randy invited union organizer Max Zimmerman (sic) to the Buckhorn jobsite to speak with Dilling employees he showed up at 11:30 a.m. After being asked to leave the site by job foreman (Paul Beecher), he entered the facility anyway and talk (sic) with employee Don Whittaker for thirty minutes. After the foreman returned from lunch Max Zimmerman left the premises immediately.

Collins received the following March 25, 1996, employee warning report from Stan Beecher for productivity violations that date, cited as having occurred between 7 a.m.—1:30 p.m.:

Randy started at 7 a.m. It took him 1 hr to finally make his first weld (spending the first hour cleaning safety glasses. . . .) At 1:30 he had made 1–6" weld, 1–8" weld, and started an 8" root. He made numerous trips to the restroom, came down several times to set welder heat, and stood smoking cigarettes on several occasions. I talked to Randy, asked him if there was a problem. He said no, that a guy couldn't bust his butt every morning. He said his legs were sore and that he now was beginning to lo(o)sen up. I told him that we had to have more productivity while on site.

Verbal Warning

Stan Beecher testified that none of the above documents had been given to Collins. The first three, the Employee Incident Reports, had not been part of DMC's disciplinary process, but merely had noted the occurrence of incidents out of the ordinary which had been placed in Collins' personnel file. Beecher termed the recording of these incidents as "freebies." These three reports had been so filed because of complaints received from other employees that Collins had been talking to them about the Union during working hours, an activity unrelated to doing the job. The only action that Beecher had taken in response to the accounts in these Incident Reports was to go to the jobsite and tell everybody there that work hours were work hours.<sup>73</sup>

Beecher explained that the disciplinary process concerning Collins did not actually begin until issuance of the verbal warning in the March 25 Employee Warning Report, written up for inclusion in his file to denote that it had been given.

Collins testified that, after his January 1996 injury, he did about 2 weeks of light layout work and then around 2 weeks of

<sup>72</sup> The record shows only that Whittaker, as described by DMC, was a nonsupervisory leadman.

<sup>73</sup> DMC's Personnel Director, Shirley Ott, more specifically explained that the incident reports, which were given to and maintained by her, were prepared in response to employees who had complaints against other employees. Collins had been irritating other employees by handing out union materials and talking to them about the union on the jobsite in violation of a vague company policy against such conduct. These were distinguished from verbal warnings, warnings and separation notices, which were prepared at the initiative of management or supervision. Ott, who had been with DMC for about 10 years, first, as assistant personnel director, and in her present role for the last 7 years, could not remember any other such reports having been kept about an employee's union activities. The only near exception was that, about a year before, such reports had been maintained with respect to a supervisor.

ground based welding. He then worked above ground for approximately the next 4 weeks from the basket of a scissors lift, which could be raised to the height of the pipes to be welded. Accordingly, he had not performed any welds or other work which necessitated raising his arms over his head. On occasions when it had been necessary to work at a greater height, he could raise the scissors lift basket and continue his tasks without needing to hold his arms above his head.

According to Collins, this assignment pattern changed on April 1, 1996, while he was employed at DMC's Bluffton Aggregate jobsite, Buckhorn. Collins testified that, on that morning, his foreman, Paul Beecher, assigned him to make two welds at levels higher than the scissors lift would enable him to reach. The fabricators had raised the pipes to the desired level during the preceding day and all that remained was to make the necessary two welds. However, as Collins described the situation, to make these welds, he would have been required to climb up from the basket of the lift, wedge in between two pieces of pipe, place his foot on the basket's guard, or hand, rail,<sup>74</sup> and work at an above ground height of about 25 feet. Collins explained that it would be necessary for him to use both hands to make the welds while using his left arm to balance himself while outside of the basket.

Collins related that he had protested to Paul Beecher that his assignment to make these overhead welds would endanger his safety. He pointed out that he would have to use his (injured) left arm to keep balance while out of the basket.<sup>75</sup> Beecher told Collins to go ahead and see what he could do. If he could not do it; if he could not perform that type of work, he would have to go home.

Collins then asked about the work being done on the ground. He was on light duty and Beecher knew about his left shoulder. Collins pointed out that there was plenty of work to be done in the fabrication area<sup>76</sup> and asked why he could not do that. Beecher replied that none of that work concerned him; it was none of Collins' business. Collins persisted, exclaiming, "Here I am injured and you've got two guys standing over there welding."<sup>77</sup> They could do this while I go over and do the welds that are on the ground." Beecher repeated that none of this concerned him; if Collins could not do the work, he would have to go home.

Collins redirected his protest to Stan Beecher, who by then had arrived at the jobsite, telling him that he felt that his safety was being jeopardized by the assignment in question. Collins would have to stabilize himself with his injured left

arm/shoulder, while trying to support and balance himself and weld all at the same time. He just could not get those welds completed. Stan Beecher told Collins to go home and have a doctor look at his arm and shoulder and have it reevaluated. If Collins could not be productive, he should not be there. Collins replied that there was no need for a reevaluation. The RediMed doctors could not do anything; but that was fine, he would go home. Collins left the jobsite for home at around 10 a.m.

During that same afternoon, on April 1, Collins went to RediMed for counseling on what to do next as his employer was not adhering to his prescribed light duty. It might be necessary for him to seek workers compensation. Collins also was interested in acquiring new documentary reaffirmation of his work restrictions from the clinic in the hope that DMC would be moved to follow them when making his assignments.

When Collins arrived at RediMed at around 4 p.m., he introduced himself to the receptionist as being with DMC and asked to speak with Dr. D. Hall. When the receptionist replied that Dr. Hall was not there that day, he told her that, since his employer was not adhering to his light duty restrictions, he needed to talk to a doctor about this. He also requested a written doctor's statement reaffirming his light duty work restrictions. The receptionist then informed him that DMC had called that afternoon, advising that Collins had reinjured his shoulder. DMC wanted RediMed to resubmit Collins as a first time visitor and, since it was a first time visit, they had requested drug and alcohol tests for him.

The receptionist then called DMC's Logansport office, speaking with Personnel Director Ott. The receptionist told Ott that she had Randy Collins with her and that Collins had said that he had not reinjured his shoulder. The receptionist then gave Collins the telephone, advising that Ott wanted to speak to him. When Collins asked what was going on, she told him that Stan (Beecher) had called that morning telling Ott that Collins had reinjured his shoulder and that he was going to RediMed. Accordingly she had called RediMed to tell them to submit Collins as a first time visit since he had reinjured his shoulder. In response to Collins' protest that there was no reinjury, Ott said that she did not understand why Stan had called down there to say that. Collins then ended the conversation.

A nurse then took Collins to a patient room. When Dr. J. Meredith, whom Collins had not seen before, came in, Collins explained that his employer had not been adhering to Collins' light duty status. Dr. Meredith asked why not and was told that it was because of Collins' involvement with the Union. The physician wrote a prescription for a strong dose analgesic, which RediMed filled for Collins. Collins signed the release and assignment approval of a RediMed billing office form ultimately faxed to DMC. On the lines for complaints and continuing into the space for examination notes, the following was handwritten onto this latter form:

New injuries today to left shoulder. Instructed by employer to ask patient to get drug screening.

Stated he refused to do the job he was told to do. Said he wanted to see the doctor. Isn't having any pain at this time.

<sup>74</sup> Collins described the hand rail as a 1-inch by 1-inch square tube elevated 42 inches above the basket.

<sup>75</sup> Collins further explained his unease at having to fill the April 1 overhead assignment by pointing out that while standing on a rail 25 feet above ground with the hood on and unable to see anything, it was necessary to rely for balance on the arm not used to hold the welding torch. When that shoulder was "hurting," the sense of balance was not there.

<sup>76</sup> Fabrication work done on the ground consisted of putting fittings at the ends of the pipes. These are bent joints which enable changes in the pipes' direction when put in place.

<sup>77</sup> Collins identified the two employees then welding on the ground as Ryan Constable and Dino Whittaker.

PE FROM in left shoulder—tender to palpation anterior and inferior to AC joint.

Collins' principal diagnosis, as more fully set forth a month later in RediMed's May 1, 1996, medical report was for partial tear of the left rotator cuff, muscle spasms, decreased motion in the left shoulder below neutral and decrease of strength and activity of the rotator cuff, et al. According to this subsequent report, RediMed had discharged Collins from further physical therapy there on April 11.

Although Collins, while at RediMed on April 1, did submit to the proffered alcohol Breathalyzer test, which he passed, he admittedly declined to take the drug test. Collins assertedly had refused this drug test because he, in fact, had not reinjured his shoulder that day; because he still was under treatment for his existing injury; and because he had gone to RediMed that day at his own initiative only to receive counseling for, and reinforcement against, DMC's failure to abide by his medically imposed existing work restrictions. Therefore, no drug test was indicated under DMC's procedures. Also, as Collins had told Doctor Meredith, he believed that his April 1 difficulties at work and at RediMed had been caused by his involvement with the Union.

In this regard, Collins agreed that RediMed had informed him that his employer had requested that he take a drug test. He also had known from reading same that it was DMC policy that employees involved in injuries or accidents at DMC jobsites would be subjected to such testing. To this effect, Collins had signed the February 23, 1995, written consent and waiver to DMC. As quoted above, this document in essence set forth Collins' agreement that, as a condition of continued employment, he would submit to drug testing at DMC's demand, waiving all legal rights to abstain.

Dilling testified that he had decided on April 1 to terminate Collins because he had "flouted" DMC's above policy concerning drug testing. He noted that Collins had partially complied with this policy by undergoing the required alcohol test, but had refused to submit to a drug test. Dilling reiterated that DMC's insurance carrier had designated RediMed as the authorized clinic for DMC employees' use in connection with injuries, workers compensation and other claims. Failure to submit to a RediMed administered drug test while seeking treatment there was ground for discharge.

Stanley Beecher testified that when Collins had called him in January 1996 to advise that he had hurt his shoulder, Beecher asked if Collins needed a ride. Collins replied that he would drive himself (for treatment). However, Collins did not show up at RediMed, the only place where DMC's insurance carrier would pay for treatment, but instead, went to the Parkview Hospital emergency room. DMC had learned of this that evening when it received the hospital's bill. Beecher related that DMC paid that bill although it had not been obliged to do so since Collins had not gone to RediMed. According to Beecher, Parkview Hospital did not subject Collins to drug/alcohol testing while there because that institution had not been aware that DMC's insurance carrier required it. Although Parkview authorities instructed Collins to see his employer's doctors the following week, which he did by reporting to RediMed, he was

not thereafter drug/alcohol tested for the January 1996 injury. Beecher explained that this was because it was too late; Collins already had been diagnosed and even treated. By the time Collins went to RediMed, it would not have been possible to detect any drugs that might have been in his system at the time of the accident.

Beecher continued that when he arrived at the relevant jobsite on April 1, 1996, having been summoned there by Paul Beecher, Collins approached saying that his shoulder was bothering him; he couldn't make the welds in the air. Beecher asked if Collins had reinjured his shoulder. Collins replied that he did not know, but that he could not make those welds. Beecher then asked if Collins needed to see the doctor. Collins answered that he did not know, "but I just can't go up and do those welds." Since these were the same welds that Collins had been doing, Beecher told him that if he needed to see the doctor, then he had better go home and see the doctor. Collins left the jobsite.<sup>78</sup>

In disputing Collins' testimony that, on April 1, he had been assigned to do welds which physically exceeded what he theretofore had been called upon to perform, including having to balance himself above the scissors lift's basket and to raise his arms to do overhead work, Beecher pointed out that the scissors lift would go up to a height of 25 feet. Also, there was another lift on site which, if needed, could go even higher. Accordingly, since the pipes to be welded were 28 feet above the ground and the scissors lift could ascend to 25 feet, it would not have been necessary for Collins to have left the basket or raise his arms overhead in order to make the assigned welds. As Collins' asserted new shoulder pain that day was preventing him from performing work which, until then, he had been doing, Beecher concluded that Collins must have reinjured himself. Accordingly, he so notified Ott. As a result, RediMed was directed to treat Collins' presence there as a first visit for a reinjury and to immediately give him the drug/alcohol tests.

I credit Collins' account of the events of April 1, 1996, and find that, in disregard of his prescribed light duty restrictions, he had been given a task that day which would have compelled him to climb up from the scissors lift basket to precariously balance on the surrounding guard rail and to raise his arms above the restricted shoulder level in order to make overhead welds. In accordance with Collins' testimony, I further find that Collins was justified in protesting and in refusing to carry out this assignment because it would have put him in danger of injury. In determining that Collins had been given this assignment because of his union activities, I note that within the less-than-three-week period immediately preceding April 1, DMC was given knowledge of Collins' union activities by union cor-

<sup>78</sup> Beecher did not know why Collins' April 2, 1996, separation notice indicated that Collins had resigned apparently for reasons relating to unsatisfactory productivity, attendance and conduct. In the context of DMC's animus, I discount Beecher's postdischarge written file statement describing the circumstances of Collins' termination as self-serving. Beecher, in testimony or in this written statement, did not explain why, in spite of his protests, it had been deemed appropriate to send the injured Collins, still on restricted duty, to work above ground in the lift while a physically unimpaired welder 13 years younger than Collins was permitted to continue working on the ground. Stan Beecher merely noted that had been Paul Beecher's call.

respondence to Dilling identifying Collins to management as a member of its organizing committee; by Collins' wearing of union t-shirts to work; by his otherwise displaying union emblems on his welding hood and tool box while on the job; and by assorted employee complaints noted by supervision in the above employee incident reports that Collins had been talking to those complainants about the Union while at work.<sup>79</sup> DMC, in this period shortly before April 1, had placed these employee incident reports in Collins' file. Although DMC was vague in explaining the use of the incident reports, denying that they were disciplinary, they purportedly recorded all reported incidents involving Collins' union activities among employees.

In the context of DMC's antiunion animus, manifested historically in *Dilling I*, and as evidenced in the present matter by the various violations of Section 8(a)(1) and (3) of the Act to be found herein and noting, too, the steps that DMC has taken in the aftermath of the settlement agreement to avoid the possibility of employing unionized workers, it would be quite consistent for DMC to create an incident which might rid itself of an employee who was unable to work at full capacity, who had been increasing its medical costs over time and, most significantly, who only recently had been revealed as a leading employee activist for the Union.

However, even with the above findings of credibility and culpability, I conclude that DMC lawfully terminated Collins because of his refusal to take the proffered drug test on April 1, 1996. As the Board noted in *Eldeco, Inc.*,<sup>80</sup> "... we fully recognize that a nondiscriminatory drug-testing policy may serve legitimate employer interests in addressing the problem of drug abuse in the work force." The record shows that DMC, at all material times, had an existing published policy concerning drug/alcohol abuse which Collins admittedly knew about when he declined to take the drug test. While this policy specifically provided for testing when an employee was injured or involved in an accident, it also provided for random testing whenever the Employer saw fit. By signing the voluntary consent and Waiver when he returned to DMC's employ in February 1995 in which, as a condition of continued employment, Collins clearly and unequivocally had agreed to submit to alcohol/drug testing at DMC's request, whenever made, waiving any legal rights to avoid such testing. Accordingly, Collins unambiguously waived any right he may have had to refuse such testing upon DMC's demand. On April 1, Collins, in part, recognized this obligation by taking the alcohol test while, at the same time, declining the other.

The record does not establish that DMC's drug testing policy had been disparately applied to Collins.<sup>81</sup> Rather, it was a pro-

cedure that had been mandated by DMC's insurer to promote safety at inherently dangerous construction sites. As noted, DMC had required that all job applicants, including Collins, when he returned to DMC's employ in February 1995, sign unqualified consents to be so tested. Also, DMC had actively enforced this course, terminating six employees who either had tested positively or who had refused to take the test. A seventh worker who did not take the test resigned under pressure. There is no evidence that any of these seven employees had been involved in activities protected under the Act.

An area where DMC can be credited is in its need to create and maintain drug-free environments at their perilous worksites. Even if, as found, Collins did resort to RediMed on April 1 because of DMC's unlawfully motivated work assignment that day, the record shows that he had not been disciplined for refusing that overhead assignment. Rather, the Employer had then expected him to be at that clinic at its expense, undergoing some form of medical consultation.

Collins' submission at RediMed to the alcohol testing requirement while refusing to undergo the corresponding test for drugs not only was an inconsistent behavior but moved matters beyond the General Counsel's argument that, in the context of DMC's discriminatory work assignment, Collins could decline testing. The fact is that Collins, when taking the alcohol test, acceded to the Employer's right to so test him under its policies. As noted, he had signed an agreement to comply with those policies on demand. Having so recognized the Employer's entitlement in this regard, Collins, although recently discommoded for his union activities, thereafter was not free to independently determine just how much of the Company's program against drug/alcohol abuse he would comply with.

Accordingly, the General Counsel, under *Wright Line*, supra, did make out a prima facie case that DMC, before discharging Collins, knew of and resented his role as an activist in the Union's organizing campaign. The General Counsel, from the credited evidence, further proved that, because of his union activities, DMC acted with established animus on April 1 to make work difficult for Collins. This resulted in his trip that day to RediMed.

DMC, however, subsequently met its rebuttal burden by showing that it had terminated Collins pursuant to its actively-enforced, nondiscriminatory drug/alcohol abuse policy because, in refusing to take a mandatory drug test at the relevant clinic after taking a correspondingly required alcohol test, Collins, by written waiver and by deed, had subjected himself to this policy. Therefore, Collins' unilateral refusal to follow the drug portion of this testing policy constituted both a breach of his unambiguous written agreement to be drug-tested on demand and an unprotected selective compliance with that policy. Collins' partial acceptance and partial rejection of this policy was somewhat analogous to an unprotected partial work stoppage. As in a partial work stoppage, Collins, while staying on DMC's payroll, independently sought to decide how much of what that employer required he would do. Therefore, DMC has shown that, in the circumstances, it would have terminated

<sup>79</sup> DMC did not establish that it had a published no solicitation rule in effect at the time.

<sup>80</sup> 321 NLRB 857 (1996). As the drug testing in *Eldeco*, unlike here, was found to have been "unlawfully promulgated and disparately enforced," it was violative.

<sup>81</sup> As noted, Parkview Hospital's failure to test Collins for drugs/alcohol when diagnosing and treating him in January 1996 can be explained by that institution's unfamiliarity with DMC's carrier imposed testing requirements. Having returned to RediMed with the diagnosis already made, it would not be possible for that clinic to later

determine through testing what Collins' drug/alcohol levels had been when injured.

Collins for rejecting the drug test without regard to his involvement with the Union.<sup>82</sup>

For the above reasons, it is concluded that DMC did not violate Section 8(a)(3) and (1) of the Act by terminating Collins.<sup>83</sup>

*c. Events affecting Steven Jacob and Cortney Wheeler*

(1) The parties' positions

As the following allegations, which cover a period of approximately 2 years, principally rest on alleged discriminatee Steven Jacob's testimony and credibility, they will be considered together.

The General Counsel and Union contend, from complaint I allegations, that DMC terminated Jacob<sup>84</sup> in May 1995 because of his known union activities. DMC, in turn, maintains that Jacob was discharged because he had been responsible for a faulty crane lift that had resulted in a cut crane cable. This had caused the load, a 4,000-pound pipe, to fall to the ground, narrowly missing and nearly killing, two nearby employees of another contractor.

Jacob also testified as the chief witness in support of the complaint I allegation that welder Cortney Wheeler, whom DMC had hired at Jacob's recommendation to work on the same project as himself, had been indefinitely laid off by that employer in violation of the Act because of her support for the Union. Jacob's testimony became central to the General Counsel's case concerning Wheeler because Wheeler was unable to testify for reasons of health. DMC argues that Wheeler was laid off in May 1995, about 2½ weeks after starting, because her welding abilities had turned out to be less than were represented when she was hired. DMC, contrary to the General Counsel, asserts that Wheeler was laid off because it did not have any more welding work that she was capable of doing and because she was not interested in accepting a lesser paid job.

TI subsequently was charged in complaint II with having refused to hire Jacob since April 1997 because of his union activities while at DMC, approximately 2 years before, and because he had participated in the earlier case as a potential General Counsel's witness. Jacob's cooperation with the General Counsel in this regard assertedly had contributed to the issuance of complaint I and to the original settlement of that matter.

TI, in denying these allegations, points out that, during

DMC's above June-July 1997 transfer of its personnel to TI, it had hired a number of DMC workers who openly had been wearing union insignia; that it had not known of Jacob's earlier employment with DMC when he had applied at TI in 1997 since Jacob had not mentioned this during his job interview with TI or in his submitted job application and resume; that the period in earlier 1997 when Jacob had applied to TI for work predated the time later that year when it actively had sought personnel to work on DMC sites and that, accordingly, TI did not then have work for Jacob. TI also had its own difficulties with Jacob when he earlier had worked for that employer and that, before 1997, it had recorded Jacob for future employment "Only . . . as a last resort" because of these problems.

(2) DMC's alleged acts of interference, coercion and restraint affecting Jacob—facts and conclusions

Jacob was hired by DMC Project Manager Gerry Bunn on April 14, 1995,<sup>85</sup> to work at that Company's SDI job in Butler, where DMC, as contractor, was involved in installing all piping, water and hydraulics work necessary to construct a steel mill for the production of flat and coil steel. DMC had begun this project in late 1994 and still was at work there at the time of the hearing.

Jacob testified that he had sought a supervisory position during his employment interview with Bunn. Bunn told him that he did not have a supervisory slot at the time but that, if Jacob brought in enough people to build a crew, he would be put in a supervisory position. Bunn asked if Jacob knew any other journeymen whom he could bring to the jobsite. Jacob agreed to bring in additional workers for the promise of being made a supervisor. In telling Jacob, during the interview, who would be working on the job, Bunn identified the General Foreman, Jim Fulford, and the Foreman, Dennis Beaton, asking if Jacob had any trouble with these people. Jacob replied no, they had worked for him in the past; he previously had terminated Fulford for safety violations. Jacob reassured Bunn that he would have no problem with working for Fulford.

According to Jacob, Bunn then asked if he was affiliated with any union activity. When Jacob replied that he was not, Bunn told him that there were union activities going on at the job. DMC was not a union company and did not sponsor any union activities at its jobs. Bunn then announced that he was going to put Jacob to work and that, as Jacob brought in the people, he would be moved up into a supervisory position.

However, contrary to his above testimony at the hearing, Jacob, in his July 19, 1995, pretrial affidavit, specifically denied that Bunn had asked him about his union affiliations. In relevant part, this affidavit reads, "During the interview Bunn told me there were no union contractors on the job. (H)e said Dilling was a non-union contractor and they would have no affiliation with a union and would not have anybody working for them who had any affiliation with a union. He did not ask me if I had any union affiliation background."

The specific complaint I allegations concerning Bunn, all of which apparently were based on Bunn's above interview with

<sup>82</sup> *Wayne Mfg. Corp.*, 317 NLRB 1243, 1244 (1995), the most supportive case cited by the General Counsel concerning Collins, is distinguishable. In *Wayne Mfg.*, as here, the Respondent knew of the employees' union activities before administering the drug test and had displayed conspicuous antiunion animus. However, unlike the present matter, the Respondent in *Wayne Mfg.* did not rebut the General Counsel's proofs by establishing that drug use had been a possible reason for its stated long standing quality control problems; that its first random drug test, never given until within 1 week of the Union's first organizational meeting with its employees, was not retributive; or that it had a "zero-tolerance for drug use." Unlike DMC, which had actively enforced its policies concerning drug/alcohol abuse, the Respondent in *Wayne Mfg.* had been willing to hire two brothers who had failed the prehire drug test.

<sup>83</sup> *Wilson Freight Co.*, 252 NLRB 917, 921 (1980).

<sup>84</sup> Jacob, a journeyman welder pipefitter, had extensive relevant supervisory and work experience when DMC hired him.

<sup>85</sup> The parties stipulated that Jacob was employed by DMC from April 14 to May 15, 1995.

Jacob, were that on unknown dates in February 1995, at the SDI site, Bunn had informed employees that DMC would not recognize and bargain with the Union if they selected it as their bargaining representative; that he had informed employees that it would be futile for them to select the Union as their bargaining representative; and that he had threatened employees with discharge if they engaged in union activities or selected the Union as their bargain representative.

Bunn did not testify in this proceeding.

Although Bunn's comments during this interview, as attributed by Jacob, further evidenced DMC's strong antiunion bias, they are not sufficiently specific to constitute violative statements to Jacob to the effect that Bunn had threatened to discharge Jacob, or any other employee, for engaging in union activities or for selecting the Union as bargaining representative. Even Jacob's description at the hearing of what Bunn had told him during that interview concerning DMC's unwillingness to deal with a union or to "sponsor union activities at its jobs," was more a general expression of that Company's distaste for unions than an affirmative statement to the effect that DMC would never recognize a union or sign a collective-bargaining agreement.

At the hearing, Jacob testified, as noted that Bunn had unlawfully interrogated him by asking if Jacob was affiliated with any union activity. In *M. J. Mechanical Services, Inc.*,<sup>86</sup> the Board held, "It is well settled that questioning a job applicant about his union preferences during a job interview is inherently coercive and unlawful even when the applicant is hired." Although the complaint did not allege that Bunn had engaged in unlawful interrogation, had Jacob's above two sworn accounts of this conversation, in testimony and in his affidavit, not been so mutually contradictory, a violation might have been found in this regard as the questioning was closely related to matters that had been alleged and had been fully litigated. However, as noted, Jacob's pretrial affidavit disputes his own later testimony of interrogation by specifically declaring that Bunn had not asked him if he was affiliated with a union. In *N.L.R.B. v. Walton Mfg. Co.*,<sup>87</sup> quoting from its *Universal Camera* decision,<sup>88</sup> the U. S. Supreme Court noted that:

. . . The findings of the examiner are to be considered along with the consistency and inherent probability of testimony. . . .

In line with the Supreme Court's emphasis on "consistency and inherent probability of testimony" in *Walton Mfg.*, I find that it would be inappropriate, even in the context of DMC's demonstrated animus and the absence of counter-testimony, to find that Bunn had violated Section 8(a)(1) of the Act by unlawfully interrogating Jacob about the Union or by threatening him with discharge during their interview. As I have not found that DMC had in any other respects violated Section 8(a)(1) of the Act during Bunn's employment interview with Jacob, the allegations of complaint I alleging Bunn's unlawful conduct are dismissed.

<sup>86</sup> 324 NLRB 812-813 (1997).

<sup>87</sup> 369 U.S. 404, 49 LRRM 2962, 2963 (1962).

<sup>88</sup> 340 U.S. 474 (1951).

### (3) DMC's 1995 discharge of Jacob—facts

As noted, following his interview by Bunn, Jacob went to work for DMC as a pipefitter on April 14, 1995, at its SDI site. In this job, he fabricated and installed new pipe, initially reporting to Foreman Beaton who then oversaw about 12 employees.

According to Jacob, within a week after starting, he brought in four to five pipefitters and welders to work for DMC, including welder Cortney Wheeler. Jacob testified that he had worked with all of these individuals for from 2 to 10 years and that he had worked with Wheeler on his every job during the 2 preceding years.

After a week at the site, he asked his immediate supervisor, Beaton, in General Foreman Fulford's presence, why a supervisory position had not yet opened up. Beaton referred to Fulford who explained that there was not enough manpower on the job at the time and that, when there was, the supervisory position would become available.

By the end of the second week, Jacob had brought in three to four more employees, but again was put off by Fulford who replied that there still were not enough people on the job to require another supervisory position. When Jacob told Fulford that he was not happy with this, Fulford answered, "Well, you know the next step." Jacob then pursued his supervisory job up the chain of command, approaching Stanley Beecher and Beaton, together. Again, he received the same response. Thereafter, reacting to DMC's failure to keep its above promises to make him a supervisor although he had brought a total of about 12 new employees to DMC's SDI project, Jacob became involved with the Union.

Having learned from Bunn at his initial interview that there was union activity at DMC's jobsite, he contacted union organizer Long of whom he had learned from the unionized employees of a neighboring contractor. Jacob shortly thereafter met with Long, signing a union authorization card and receiving from Long a blue t-shirt with the legend "Union, Yes," and union buttons bearing the same message. Jacob related that he subsequently wore these items to work every day, a practice noticed by Beecher, Beaton and Fulford. He met with Long two more times after that first meeting, at least once accompanied by the 12 employees, including Cortney Wheeler, whom he had brought to DMC.

Jacob testified that on May 15, 1995, at around 9 a.m., he and Fulford were using an overhead crane operated by an unidentified third DMC employee to lift a pipe 36 inches in diameter and about 40 feet long. Jacob estimated that the pipe being raised weighed about 4,000 pounds. The block of the crane, with five or six attached pulleys, held a hook. Accordingly, two chokers, large, strong slings with eyelets at the ends, were wrapped under the load, balancing it. The block hook was placed through the chokers' eyelets, cradling the pipe so as to enable the lift. Jacob explained that the load had been angled to an eight degree tilt so that it could go up, proceed over a wall and dip, one end down, into a tunnel where other workers were waiting with jerry rigs to receive and properly position it. To achieve this, it had been necessary to move the chokers off center by a requisite amount to sufficiently tip the pipe so that one end would be projected into the tunnel.

As Jacob related, Fulford, working with him to prepare this

lift, put a choker around one end of the pipe while Jacob did the same at the other end. Then each of them attached tag lines, which enabled them to directionally maneuver and position the elevated load. When the load was ready, Jacob told Fulford, the supervisor, "You've got it. It's your lift." Fulford replied, "Okay, let's get up on it," an expression which meant to pick up the load. Fulford then hand signalled the crane operator to raise the pipe. When the load reached a height of about 16 to 18 feet, it dropped a foot for no apparent reason. Jacob and Fulford, each holding the tag lines at either end, moved out of the way. Jacob explained that when a lift dropped as that had done, something definitely was wrong. He told Fulford that there was no reason for that drop. Fulford responded that it probably was just the crane operator.

Fulford then again told the crane operator to "go ahead and get up on it." With that, the pipe fell to the ground. After the 9 a.m. break, two rubber tired cranes were brought in and used to make the lift. When this was done, Jacob and Fulford went back to their more regular work.

Jacob expressed relief that no one had been under the pipe when it fell; anyone so situated surely would have been killed. He testified that the second attempt after the crane had dropped was an unsafe action by Fulford and the crane operator. Once the slippage had happened, the process should have been stopped immediately and everything should have been inspected. Jacob previously had participated in making such crane lifts "hundreds of times."

Jacob learned of his discharge at around 4:45 p.m. that day when Beecher descended into the tunnel and told Jacob that he was going to have to terminate him. When Jacob asked why, he was told for, "The crane incident. You tore up a piece of equipment." Jacob replied, "Wait a second. I didn't make the lift. I rigged it and I did my job. Mr. Fulford, on the other hand, told the operator to get up on it, and on the other end the operator was at the point where he could look at the pulleys and see if it came out of the shivs (pulleys) once it dropped a foot. I was not, And it was not my fault." According to Jacob, Beecher's response was, "Well, you're my fall guy and you're taking the heat for it." At the time of this conversation, Jacob was wearing a union shirt and union buttons. Jacob's testimony that he had not been interviewed during the investigation of the crane incident that preceded his discharge, is unrefuted.

Company owner/president Dilling related that he had decided to terminate Jacob on the basis of Beecher's report to him. Earlier on May 15, perhaps 2 hours after the incident had occurred, Dilling received a call from Glen Pushis, SDI's owner, who told Dilling that DMC's workers had misused and damaged one of SDI's cranes, causing an accident that had almost cost two lives. Pushis wanted whoever was responsible for the accident off the jobsite. Dilling contacted Area Superintendent Beecher, who then was at that jobsite, telling him of his conversation with Pushis and of what Pushis wanted. Dilling directed Beecher to handle the situation.

Beecher testified that Fulford had called him to the SDI site on May 15, and that he arrived there shortly after the accident had occurred. He then participated in a joint DMC-SDI investigatory panel consisting of himself, Fulford, Bill Powers and another unrecalled individual to determine what had occurred.

The lift had resulted in a broken cable and the fallen pipe load had nearly hit and could have killed two employees of a nearby concrete contractor, Newburgh Perrini, based in Chicago, Illinois.

While Beecher initially testified that the panel had questioned Jacob and the two unrecalled individuals who were working under him at the time, he did not reaffirm that the panel had approached Jacob. Beecher testified that Jacob was the leadman in charge of making the lift<sup>89</sup> and had been responsible for the job that the men working with him were doing. As a leadman, Jacob was paid \$1.00/hour more than the journeymen were. Beecher related that Fulford, who no longer worked for DMC and who did not testify at the hearing, had not been present when the accident occurred.

According to Beecher, Jacob had made the lift with the assistance of two helpers, neither of whom he could identify. One had helped Jacob rig the pipe load for the lift, while the other had operated the remote controlled crane. Beecher related that the cable had been cut because the crane arm, when making the lift, had not been directly over the load as it should have been to enable a vertical lift. Accordingly, the load had been raised at an angle. This sideways movement caused the cable to ride up out of the groove in the pulley at the top of the crane, in which it normally turned. When that happened, the cable became caught in the sharp pinch between the roller and the support on that roller. The load's weight induced pressure then caused the cable to be cut "like a knife." At the time, the block, to which the hook was attached, was about 20 to 25 feet in the air. With 20-foot long straps attached to the hook, supporting the load, Beecher estimated that the pipe load might have been around 10 feet above the ground, dragging the other end. This indicated that the pipe had not been properly loaded into the straps. Beecher explained that cranes run on crane rails from column to column in buildings. The area between the columns is referred to as a bay. The immediate building had three such bays. The problem had arisen because instead of making the lift from the bay in which the crane was located, which would have enabled a vertical hoist, the cable was extended outside the crane bay area into the next bay. The dragging occurred when an effort was made to pull the pipe into the crane's bay so that a vertical lift could then be made.

Beecher testified that Jacob, as leadman over the crew, had been the person responsible for making the failed lift. In addition to the worker who had helped him rig that load and the crane operator, Jacob's work crew had included the two welders in the ditch (tunnel) waiting to receive the pipe, end-first, for installation there.

Describing his investigation, Beecher stated that he talked to SDI's Pushis, who already had spoken to Dilling; Newburgh Perrini's foreman and one of their laborers who had seen the whole thing. They, reportedly, had the same "story" as the two members of Jacob's crew whom Beecher also interviewed—the crane operator and the rigger who had helped Jacob. Beecher could not identify either the crane operator or the rigger who assertedly had helped Jacob set up the lift. SDI's representa-

<sup>89</sup> DMC does not contend that Jacob had been a supervisor or agent within the meaning of the Act.

tives, who had been “right there,” had filed their report. Later that afternoon, Beecher had called Dilling with his conclusion that Jacob had been responsible for the accident.

With Dilling’s approval, on May 15, 1995, at approximately 4:45 p.m., Beecher told Jacob that, due to the fact that he almost had killed two people, DMC was letting him go.

None of the members of Jacob’s asserted work crew or the individuals<sup>90</sup> interviewed during the investigation of that incident were named in this proceeding and no convincing written report by Beecher,<sup>91</sup> or by SDI, was placed in evidence. The two Newburgh Perrini employees who assertedly nearly were killed in the accident also were not identified.

On the other hand, in Jacob’s July 19, 1995, pretrial affidavit, although he had named Fulford as a participant in the lift, he blamed the accident on the crane operator, rather than on Fulford. His description there was that:

Earlier that morning we were putting pipe in the tunnel. There was an operator in an overhead crane to put the pipe in the hole. I was on the ground and I pulled the block from the crane to the load and hooked the load. Fulford was on one end of the pipe and I was on the other end. When the operator got the load about 15 feet up one of the cables slipped out of one of the pulleys and cut the cable and the piece of pipe fell to the floor. Nobody was hurt. The pulley (called a shiv) is located in the block that is above the hook on the end of the cable. What I did was put the hook in the choker cable which goes around the pipe. I did not do anything to the block or the pulley part of the cable. That is not part of my job. That is the responsibility of the crane operator. If the choker had broken or come

loose, that would be my responsibility. The choker did not break or come loose in this accident. The operator is a Dilling employee as well. Nothing was done to him over the accident.

Jacob’s 1995 affidavit, which was given about 4 years closer to the event than was his testimony during the trial in this matter, was inconsistent with that testimony in that it made no mention that the load initially had slipped; that Fulford had given hand signals or that he had overridden Jacob’s warning to direct that the lift proceed after it had dropped. In fact, the affidavit did not state that Fulford had directed the lift in any way. Jacob did aver in this statement that when Beecher, at the end of the day, had told him that he had to let him go because of the accident that had happened that morning, he responded that, if Beecher was going to run him “down the road for that then he ought to run the operator and the supervisor who had his hands on the load when it fell down the road too.” Beecher’s answer was that Jacob was the “fall guy,” that he had made the call. As noted, this affidavit does not specify whether Fulford or Jacob, as Jacob and Beecher respectively countercharged at the hearing, had made the “call” to start the disputed lift.

Jacob’s separation notice, as later was the case in Collins’ removal, did not set forth the Respondent’s reasons stated at the hearing for having terminated him. The notice, signed by Bunn and effective May 15, 1995, showed that Jacob was discharged for “unacceptable conduct.” He was evaluated as satisfactory for quality, productivity and attendance and was rated unsatisfactory only for conduct.

#### (4) DMC’s 1995 indefinite layoff of Cortney Wheeler—facts

At Jacob’s recommendation, on May 1, 1995, DMC hired Cortney Wheeler<sup>92</sup> to work under Fulford’s immediate supervision as a welder at its SDI jobsite, Butler. Wheeler was one of the dozen employees whom Jacob had brought to DMC in the hope of attaining a supervisory position by building a sufficiently large work crew. Beecher related that Project Manager Bunn, who then was overseeing the job, initially interviewed Wheeler on the telephone. In urging that Wheeler be hired, Jacob had stated that Wheeler was not a certified welder, but that she was learning and that she could weld pretty well. After that phone interview, Bunn reported to Beecher that Wheeler had declared that she could do both stick and T.I.G. welding. According to Beecher, DMC had hired Wheeler because of these representations. She was put to work at an hourly rate of \$1 less than the certified welders were paid. As noted, for reasons of health, Wheeler did not testify at the hearing. No adverse inference will be drawn from her inability to so appear.

Beecher testified that it was “not uncommon” for DMC to hire uncertified welders like Wheeler who had not passed state certification tests. Beecher explained that while certification is nice to have, it was not really required by most customers. It usually would take DMC’s supervisors about a half day to observe from work quality whether a newly hired uncertified welder had the skills necessary to pass the certification test. From such observation, Beecher concluded that Wheeler would

<sup>90</sup> Neither Jacob nor any DMC representative could name the individual who had been operating the crane at the time of the accident.

<sup>91</sup> The record does contain on a sheet of DMC stationery, labeled Employment Report of Steven Jacob, entries concerning the two mishaps that employer attributed to him. The first, April 23, 1995, occurrence was that Jacob had “attempted to move pipe wagon sideways by pushing side to side with fork lift while wagon was loaded. Buckled front axels (sic) requiring front axels and wheels to be replaced.” An itemized following list for frame, labor rebuild, expenses, phone, travel, procurement and lost production, totaled \$3,716.70. On the stand, Jacob, when shown the document, repeatedly denied knowing anything about the asserted April 23 incident and no DMC witness testified concerning it.

The immediate, May 15 incident, which followed, read: “Overhead trolley crane was rigged in a side pull by Steve Jacob. One of our riggers told Jacob this was not a good idea. Jacob gave instructions for operator to lift the load. The load cable overcapped on cable drum and cut cable, dropping load, plus cable block to ground. This incident could have fatally injured two people. Our customer, Steel Dynamics, demanded to know what action we were taking. We decided to release Steve Jacob.” The cost of the incident was then unknown.

Noting that there was no indication as to who had prepared these unsigned reports; that they were “stockpiled” on a single page in a manner at variance with the single event preprinted employee incident and warning report forms that DMC otherwise had used; that no DMC witness had challenged in testimony Jacob’s denial that he had known anything about the April 23 incident; and that no specific foundation had been established to support the document as a business record kept in the ordinary course of business, I give no evidentiary weight to this asserted dual incident report.

<sup>92</sup> At the time of the hearing, Jacob and Wheeler had been engaged for about 2½ years.

not have been able to pass that test. Wheeler was allowed to work in the field, as were other welders, and established that she could perform only socket welds. Beecher explained that a socket fitting is hollowed on the inside. To make a socket weld, the welder welded around the fitting and the pipe that had been inserted into it. Beecher termed this type of weld the simplest made in the pipe work trade. Wheeler was laid off on May 19, 1995, because DMC had run out of socket welding work at that time. Wheeler earlier had been asked to do stick welding but had been unable to perform that work.

According to Beecher, the stick welding that Wheeler had been unable to do, involved using an electrode in an electrode holder with "the metal right there in that electrode. And it's just a matter of welding with that. That's normally the first process a welder learns is to stick weld. Then they pick up on the T.I.G.<sup>93</sup> and the M.I.G. welding later on." Beecher related that, while Wheeler had been doing a form of T.I.G. work in her socket welding, this socket welding, which Beecher characterized as the least complicated of all welding, was all that she could do. Wheeler, for example, could not make a T.I.G. butt weld where a fitting, "butted" against a piece of pipe, is welded.

Beecher related that DMC's certified welding inspector on its SDI site in May 1995 was Rodney Confer,<sup>94</sup> who had been hired during the preceding month. At the start, Confer had tested Wheeler and reported to Bunn and Beecher that she was quite weak in the T.I.G. welding area. During the afternoon of Wheeler's first day on the job, Confer had reported to Bunn and Beecher that, in testing Wheeler, he had her T.I.G. a butt weld, a carbon 2-inch weld. She had worked at it for 4 hours and still did not have a proper root in the pipe. Confer further reported that he had tried to get Wheeler to stick weld, but that she did not "have the mechanics to stick weld." Wheeler assertedly admitted that she had never stick welded.

Beecher avowed that the Company had worked with Wheeler during her first week on the job, after she had announced that she could not do stick welding, assigning her to weld hangars. However, she also could not learn to do this work. When Wheeler declared that she could T.I.G. weld, she was given a butt weld assignment. It took her 6 hours to put in a root and "the root wasn't acceptable. She obviously never had butt welded; never tiggd a butt weld, before."

Finally, on May 19, 1995, less than 3 weeks after she had started with DMC, Beecher, who had been on the jobsite for the entire time that Wheeler was there, and General Foreman Fulford went to where Wheeler was working. Beecher explained to her that the Company had no more socket welding work remaining to be done at that time and did not expect to have any more for the next few weeks. So, Beecher told Wheeler that he

was going to lay her off.

Beecher explained that he had made the decision to lay Wheeler off in consultation with Fulford. She was not demoted but was let go when the Company had run out of socket weld fittings and pipe to weld. This also was because Wheeler had demonstrated that she would not have wanted to be cut back to a helper's classification at \$2 to \$4/hour less than she then was receiving. Wheeler had complained during her last 2 days on the job when assigned to the helper's job "of prep grinding pipe to put a bevel on it. This process prepared the pipe for welding." Since Wheeler had protested this helper's assignment, Beecher had not asked her to become a helper. Also, he could not afford to pay a helper, which was how he regarded Wheeler, at the higher welder's rate she was receiving. Wheeler was just one of several employees who were dismissed at the time because they could not weld. Beecher named another individual who assertedly then also was let go for a like reason.

The reasons for layoff set forth in Wheeler's May 19, 1995, separation notice, signed by Bunn, were more specifically related to those given at the hearing than had been the case with respect to Jacob and Collins. The checked off reason for layoff was Wheeler's "Unacceptable Performance," and she was rated in evaluation as unsatisfactory only in productivity. Wheeler's work quality, conduct and attendance all were marked as satisfactory.

Personnel Director Ott explained that she had prepared a written history of Wheeler's employment with DMC at Bunn's request. Ott did this even though the circumstances of Wheeler's departure from DMC did not fit into the situational categories for which that Employer generally made such summaries, such as injuries, drug testing, employee insubordination and damaging of equipment. Ott recounted that Bunn had asked her to document Wheeler's history because, when she had learned of her layoff, Wheeler had become abusive with him and had threatened to file Equal Employment Opportunity Commission charges against DMC. Accordingly, Bunn had asked Ott to make a record should there be trouble later.

Ott's unsigned, undated employment report showed that Wheeler, *inter alia*, had been assigned during the first week after her May 1, 1995, hire, to weld structural pipe supports (hangars). The welds were noted as unacceptable. During the second week, Wheeler was assigned to pipe tunnel, T.I.G. welding process on open root. Again, the welds were unacceptable. She then was assigned to T.I.G. welding process on socket welds, with Confer's there noted agreement to help her attain quality level. Wheeler's productivity level picked up during the next 1½ weeks. During the third week, DMC had no more T.I.G. socket weld fittings to be done. Wheeler was assigned to other tasks and the welding machine was assigned to another employee. On May 18, Wheeler complained about having to use a grinder and was told that DMC very much wanted to give her an opportunity but expected its employees to help out in other ways when there was no welding to be done. Wheeler then was told that the welding machine had been reassigned to weld out closure plates to meet a customer's schedule and that she could attempt to do that task if she chose. She was told to look at the closure plate task and to let the Company know if she wanted to try it. About an hour later, when asked by the job

<sup>93</sup> Beecher explained that in T.I.G. welding, no electrode is used. The T.I.G. process involves a tungsten arc, normally shielded by argon gas to keep the weld pure and free from impurities.

<sup>94</sup> Beecher averred that Confer had been certified for welding and instruction by the American Welding Society after a course of study of all welding areas and upon examination. Confer's credentials situated him to give welding tests to all newly hired DMC welding employees, which he did on their respective first days at work. Wheeler, too, had been subjected to Confer's testing when she reported in.

superintendent, she indicated that she was having no problem doing this. The decision was made to release her on May 19. Wheeler was told that DMC did not have any socket weld work available at that time and that her other welding skills did not meet DMC's standards. She was given a reduction in force layoff.

Jacob, testifying on Wheeler's behalf, averred that, by 1995, he had 18 years experience as a pipefitter, piping foreman, piping general foreman, and piping superintendent. During 8 to 10 of those years, he had been piping foreman and piping superintendent. Since 1993, Wheeler had been employed on every job on which he had worked and, noting that pipefitters such as himself, usually worked in tandem with welders, pointed out that she had been his welder since 1994. From this professional experience and his observations, Jacob regarded Wheeler's work as "very competent." She had "qualified skills" in arc welding, welding of sockets and had built supports. Mostly, Wheeler did pipe work.

Although Jacob testified that he had seen Wheeler at, at least, two May 1995 union meetings conducted by Long at a local hotel, she had attended these meetings as but one of the 12 employees whom Jacob also had brought to work for DMC. All of these individuals, according to Jacob, also had attended the sessions. While Jacob related that he had worn union paraphernalia at work, there is no such testimony concerning Wheeler and there is no direct evidence that DMC's supervisors had known of her attendance at union meetings or of her prounion sympathies. In this regard, in May 1995, Wheeler's personal connection to Jacob was not as clear as it later became. If, as Jacob estimated at the 1999 hearing, he and Wheeler had become engaged about 2½ years before, that relationship was not yet in place when Wheeler was working for DMC. Accordingly, Wheeler, at the time, was but one of the approximately twelve employees Jacob assertedly had brought to DMC when pursuing a supervisory position with that company.

Robert S. Rentfro<sup>95</sup> also testified on Wheeler's behalf. Although Rentfro had known Wheeler for 8 years and had worked with her on four jobs, he did not have an opportunity to observe her work until they both were employed at Alert Contractors, Lafayette. Rentfro was there from July 1994 until July 1995. During his last 8 months on that project, Rentfro served as a welding inspector and supervisor. As such, he oversaw a crew of eight pipefitters and welders, assigning work, checking what was done and giving all the welding tests to anyone who came onto the job. Wheeler's employment at the Alert Contractors project overlapped his own during Rentfro's last 3 months there.

At Alert Contractors, Rentfro gave Wheeler the T.I.G. 6 inch butt heliarc test, which she passed. Rentfro rated Wheeler's performance on the test as above average in comparison to other individuals whom he had tested. He maintained that the T.I.G. welding in which he had examined Wheeler was far

more difficult than stick welding. In keeping his eye on work done by employees who were not members of his crew, he had checked Wheeler's output and had found her to be a good welder. Also, Wheeler had substituted for a missing member of Rentfro's crew for 4 days while on that job. During this period, Rentfro had prepared the pipe for Wheeler and she "welded everything out." At the time, Wheeler had done T.I.G. welding stainless. He reiterated that he considered Wheeler to be above average, a good welder. Although Rentfro and Wheeler were concurrently on another job in 1995, they did not work together. Rentfro did not observe Wheeler while she worked for DMC.

#### (5) TI's 1997 failure/refusal to hire Steven Jacob—facts

Jacob initially testified that, starting in 1994, before DMC, he had four periods of employment with TI, having initially been interviewed that year for, and offered work by, the recruiter at that company's Indianapolis office, Larry Paulen. During that interview, according to Jacob, Paulen had told him that he simply found people to go to work for other people; that he would find jobs for TI employees with Don-Lee Construction and with other contractors; and that TI was a nonunion employer.

As a result of this 1994 interview, Jacob assertedly was sent to work for Don-Lee, Inc., an Indianapolis-based contractor that then had several jobs in progress in Indiana and Illinois. While with Don-Lee, Jacob was supervised by a Don-Lee supervisor and not by TI. Jacob filled out timecards reflecting his work hours each day, which the Don-Lee supervisor would total out and sign. At the end of the week, the Don-Lee supervisor would sign the bottoms of the time cards. The cards then were sent to TI which would prepare its own checks for the hours worked. While working under Don-Lee's supervision to perform Don-Lee assigned project tasks, Jacob was paid by TI. Jacob also followed Don-Lee's distributed safety rules and sought that company's permission to take time off.

Jacob related that before 1995, TI had sent him to several jobs for varying periods of 1 month or longer.

In the summer of 1995, Jacob, through TI, worked in Champaign, Illinois, for an Anderson, Indiana, based air conditioning and freezer company. Jacob testified that he had voluntarily quit TI "some time after 1994 or 1995 for a better employment opportunity." He did not receive any referrals from TI in 1996.

Jacob averred that, in August 1997, about 2 months after the settlement was reached in complaint I, in which he was to have been a principal beneficiary, he had two or three contacts with TI. The first came when, out of work, he had called TI's Indianapolis office and spoken to "Mike," who dispatched employees to jobs. When Jacob asked for a job placement, he was told that there was a job in Lafayette. Mike asked if Jacob had any problems with Dilling. When Jacob answered, "No," Mike told him that he would have to call Dilling Mechanical and get back to him.

Jacob called Mike back either that evening or the next day and asked about the job. Mike told Jacob that DMC had refused to hire him; that he had caused "problems with the N.L.R.B. and with union activities."

One or 2 weeks later, Jacob again called, speaking this time

<sup>95</sup> Rentfro, a welder and pipefitter for 10 years, has been a journeyman certified in T.I.G. and stick welding for 8 years. For the 2 years preceding the hearing, Rentfro has been a member of Plumbers and Pipefitters Union Local 157, which had given him a journeymen's card after he passed union administered welding tests.

to Recruiter Larry Paulen. According to Jacob, Paulen, too, did not refer him, telling Jacob that because of his problems with Dilling and the union activities; TI not being a union contractor, he did not supply union labor.

However, on cross-examination, Jacob, when confronted with TI's records, backed away from his original testimony that he first had applied for work there in 1994, during which year and in 1995, he worked on several jobs via TI's referrals. Rather, TI first interviewed him for employment on June 11, 1996. Jacob had sent TI a resume on about April 22, 1996, in response to a newspaper advertisement and, in turn, had been called by Paulen to come in for an interview. During this June 11 interview with Paulen, Jacob completed his only job application for TI. Jacob's application to TI did not refer to his being a union member and he did not indicate thereon that he had worked for DMC. Jacob's earlier resume, faxed to Paulen on April 22, 1996, did show that he held current certification from Building Trades Journeymen's Pipefitter & Steamfitters Local #166. Although the resume detailed his prior work experience, this document, too, contained no reference to his prior employment at DMC. Before being put to work, Jacob also took a pipefitter mechanic's test. Although, Jacob had applied to TI for a supervisory position, TI never referred him in that capacity.

Within a week after that June 1996 interview, TI referred Jacob to a job in Illinois that he recalled as being with Industrial Refrigeration, based in Anderson, Indiana. The location had been near Jacob's home at the time and, accordingly, he had received that assignment because of its convenience. He then left Industrial Refrigeration to go to Florida during the week ending June 28, 1996, going before that job was over. Before leaving, Jacob gave Industrial Refrigeration 2 days' notice of his pending departure. He gave TI no advance notice of this at all.

Jacob did not again work for/via TI from the week of June 28 until the first week of August 1996. When Jacob did return to TI that August, he was assigned to Don-Lee, Inc., to work on a renovation of the Indiana University Purdue University Indianapolis (IUPUI) Medical Center at the prevailing hourly wage rate of \$24.46. Jacob continued on that job for about 6 weeks when the prevailing rate work expired. Jacob, contrary to TI, contended that he then had agreed to continue on the site at the nonprevailing rate of \$17/hour, without per diem, but was vague as to how that job had ended for him. He could not recall if he had quit and left for home. He did leave that job on about September 6, 1996, and did not again work for TI.

Jacob could not recall whether, between June and September 1996, he had had six recorded violations of TI's no-fault attendance policy, for failing to show up for work or for having arrived late for work. This policy was set forth in that company's employee policy manual which, the record shows, had been given to Jacob when he began his association with TI.

Summarizing TI's above cross-examination of Jacob concerning his employment history with TI, Jacob conceded that, instead of having worked several jobs for that employer during 1994 and 1995, that relationship did not begin until 1996, after which it lasted intermittently only between June and the beginning of September of that year. Jacob, because of his own ac-

tions, was not associated with TI during July. Also, TI had referred Jacob for work within a week of his June 1996 interview although his resume had put TI's officials on notice of his union affiliation. Although TI, while knowing of his union connection, had given Jacob two employment opportunities, including one at the prevailing wage, he summarily had quit both jobs without giving TI advance notice and, at most, token notice to its clients, the employing contractors.

Contrary to Jacob's initial testimony that, to get pipefitting work in August 1997, he then had called Mike at TI's Indianapolis office, Jacob's September 3, 1997, pretrial affidavit noted that his first such call had been made in late March or early April 1997, when he had spoken to "Rick," who had told him of the prospect of a long-term Dilling job with Caterpillar at Lafayette and asked if he had any problems with Dilling before. When Jacob said no, Rick told him that he would have to get an O.K. from Dilling to hire him. Instead of Jacob making the described follow-up call, according to this affidavit, Rick had called him back in about half an hour telling Jacob that Dilling had refused to hire him; that "Dilling had me down as not able to rehire for problems they have had with me." When he asked Rick what he meant by that, Rick had not given him a straight answer.

The statement Jacob attributed to TI to the effect that company would not hire him because he had caused a lot of problems with Dilling, that he had cost Dilling a N.L.R.B. case; that Dilling and TI were unaffiliated with the Union and that, because they are strictly nonunion, they did not want any union employees, according to Jacob's affidavit, was made to him by "Larry," presumably Paulen, when he next called TI for work in late May 1997. Larry assertedly had ended this conversation by telling Jacob to quit calling TI. Thereafter, neither TI nor Jacob have called each other. Jacob explained in this statement that he had not contacted TI after May 1997 because he had found work elsewhere.

Also, Jacob had described himself in this affidavit as having held the position of "Pipe Fitter/Pipe Welder and Pipe Supervisor," a position he insisted that he had filled. However, Jacob could not provide any supervisory indicia or, even an actually assigned job title, that would have indicated such status.

TI's Paulen testified that he employed Jacob to work on the Industrial Refrigeration job in Illinois as a pipefitter welder in June 1996 after Jacob had responded to a TI newspaper ad, and had followed by submitting his April 22, 1996, resume. He hired Jacob on the basis of his resume, interview and reference check. From notations made on Jacob's job application form, TI's officials were impressed with Jacob's background when he first sought work with them.

TI's timecards summary for Jacob shows that he had worked for Industrial Refrigeration Services, the job he had been hired for, from the week ending June 14 to the week ending June 28. He worked 14.25 hours of that final week at Industrial Refrigeration, also working an additional 19 hours that week as a journeyman plumber at Quality Electrical Services.

The checked boxes on Jacob's TI employee separation in-

formation Form,<sup>96</sup> “date faxed” July 16, 1996, indicated that Jacob had not separated due to lack of work, that he had quit without just cause and that he had refused to accept work. At the bottom of the form under “Additional Information,” it was noted that, “Steve had to leave on an emergency vacation with his father. He gave only 2 days notice in the middle of a job. Very upset contractor.”

Paulen and Mike Morris, presumably the “Mike” whom Jacob also assertedly had contacted for work in 1997, both testified that Jacob’s abrupt departure, as a leadman, from the industrial refrigeration<sup>97</sup> job, when there was at least 1 to 2 months’ work remaining to be done there, had left that client in the lurch and had created a “big” customer relations problem.” TI nearly had lost that account.

Paulen testified that TI next employed Jacob after his sudden quit during the week ending August 9, 1996. On Jacob’s return, as noted, he was assigned to work with Don-Lee, Inc., on the IUPUI Medical Center job. Paulen explained that TI had rehired Jacob when he again applied in spite of the circumstances of his earlier departure because it had available work that he was qualified to perform and because TI then needed people on that job.<sup>98</sup>

Jacob’s timecard history revealed that he continued to work on the IUPUI job almost through the week ending September 6, 1996. These records further showed that Jacob worked on two different job assignments for the same contractor at the same site during that last week. One assignment paid the prevailing hourly rate of \$24.46, while the other was at \$17/hour, Jacob’s base pay when not on the prevailing rate. Paulen related that Jacob worked at the lower, nonprevailing, rate for 1 day and then remained in his hotel room without going to the jobsite.

Paulen testified without convincing contradiction that Jacob had called him from his hotel room and declared that he would not work for \$17 an hour unless he received a per diem allowance for having come to the site from Illinois. Paulen replied, that was what the job entailed. He pointed out that Jacob already was there in town. Would he rather not work for \$17 an hour instead of zero? It was not as if Jacob had to travel from Illinois to get to the job; he already was there. Jacob then announced that he had made a decision; that he was not going to work on that job anymore. Paulen told Jacob that he again was jeopardizing TI’s relationship with its client because he was a qualified pipefitter and the lead person on that job. He had responsibilities on that job that he was dismissing as unimportant. Jacob did not return to the jobsite.

Paulen summarized the above conversation in TI’s computerized record of its notes on Jacob, there entering that Jacob was being “moved to inactive because he refuses to work on nonprevailing wage jobs unless he gets per diem to drive from

Illinois and stay here in Indy. We informed him when we hired him that there would be no per diem because the contractors here will not pay it when they can just hire qualified guys locally.” After noting Jacob’s sojourn in his hotel room, Paulen’s note concluded, “Well, we replaced him with someone just as qualified and sent him home. Only use as a last resort in the future. Bad attitude, thinks he taught God how to weld. Move to inactive.”

Paulen attested, and the same notes record confirmed, that during his two periods of employment with TI in 1996, Jacob had accumulated six occurrences under TI’s no-fault attendance procedure, contained in its policy manual. Under this scheme each employee’s loss of worktime, whether for sickness or lateness, regardless of justification, was an occurrence. Progressively, in the first phase, six occurrences resulted in a written warning. Paulen testified that Jacob had a sufficient number of occurrences in his record for a written warning when he left TI in September 1996. However, the fifth and sixth occurrences both were charged to the single incident when he had refused to work for the lower rate without receiving per diem.

These earlier listed occurrences were, on June 14,<sup>99</sup> when Jacob had called in concerning the need to take his daughter to the hospital; on June 24, when he called to announce that he would be late for the quality electric job in Wabash; on July 10, when, in response to TI’s paging after Jacob’s sudden June 28 departure for Florida, Jacob assertedly had called promising to immediately return and to call for assignment, which he promised he did not keep; on August 13, when Jacob, without notifying TI or the contractor, did not show up at the Don-Lee job (noted as possible grounds for dismissal); and on August 20, when Jacob called to advise that he would be 3 hours late that day to the job at Camp Atterbury.

Paulen testified that later, during the first quarter of 1997, Jacob called announcing to Paulen that he was looking for work. Paulen replied that TI did not have anything available in Jacob’s trade at the time. Paulen explained that TI then was not hiring any journeymen pipefitter welders and was not bringing back any inactive workers in that classification. As the individual who had placed all the relevant advertisements, Paulen knew that TI did not run any ads until late June 1997. He had hired no pipefitters welders in May 1997. That early 1997 call was his last contact with Jacob.

Paulen and Morris<sup>100</sup> both denied having told Jacob that he would not be put to work because of his union activities or that he would not be hired because he had cost Dilling a N.L.R.B. case. Morris also denied having asked if Jacob had any problems with Dilling. In this regard, both men denied having known of the existence of any prior N.L.R.B. case involving Dilling and Jacob when they respectively spoke to Jacob in 1997. Morris also denied that TI had an office employee named Rick at its Indianapolis office during 1995–1997.

<sup>96</sup> TI’s Employee Separation Information Forms, as indicated by the form’s title, are informational, not disciplinary, records. They are completed as soon as possible after an employee leaves TI’s employ.

<sup>97</sup> As Morris recalled to the same effect, it was the Quality Electric job that Jacob had left.

<sup>98</sup> As the General Counsel correctly pointed out, TI’s policy manual provides for employment at will, enabling its employees to leave jobs without notice. However, TI, for practical reasons, had requested that its employees provide 2 weeks advance notice of planned departures.

<sup>99</sup> There was an apparent juxtapositioning of dates between the cited entry and the preceding one relating to his hire.

<sup>100</sup> Morris testified that, around March or April 1997, Jacob had called asking for pipefitting work in the Indianapolis area for himself and his girl friend. Morris replied that he then had no open orders, but that Jacob could check back with him.

Paulen pointed out that Jacob never told him anything about his prior employment at DMC during their interview and also had omitted that information from his sole 1996 job application and resume to TI. Paulen learned of Jacob's prior employment with DMC when he received an unfair labor practice charge later in 1997.

(6) Events affecting Steven Jacob—discussion and conclusions

(a) *General credibility*

From his entire record testimony, it generally was difficult to credit Jacob. While he was on the stand, it was necessary to repeatedly caution Jacob to answer clearly and responsively and not to be argumentative during cross-examination. As noted in the above factual discussions, Jacob was successively contradicted in his original testimony and compelled to retreat when confronted by other documentation, including his own prior sworn statements.

Accordingly, as found above, the conflict between Jacob's testimony at the hearing and that in his pretrial affidavit concerning whether DMC's Bunn had violated Section 8(a)(1) of the Act by remarks made to Jacob during the latter's employment interview was pronounced. The internal inconsistencies, as noted, were such as to prevent me from crediting Jacob's testimony concerning that interview even though it was not contradicted by other testimony at the hearing.

Jacob's testimony concerning his own welding background, apparently adduced to add weight to his favorable evaluation of Wheeler's welding abilities, shifted as he spoke. He initially testified that once a welder was certified, the certification became his license. He then explained that a welding certification had to be renewed every year.<sup>101</sup> However, Jacob continued that, if a welder continued to work for a given company continuously for more than a year, or stopped welding, the certification would expire a year after whichever happened first—the end of the employment or the cessation of welding. This statement was contextually relevant to suggest that such continued employment might have been a reason for Jacob's not having had to renew his certification. However, when drawn from him, Jacob then conceded that, as he had many employers since 1984, he would have had to renew his certification yearly for it to have remained current. Finally, he explained that, since he preferred fitting pipe to welding it, he had been seeking work as a pipefitter.<sup>102</sup> However, in his September 3, 1997, pretrial affidavit, he deposed that, when previously employed by TI, he had held the position of "Pipe Fitter/Pipe Welder and Pipe Supervisor." Contrary to this representation, Jacob could not indicate any statutory supervisory position he had with TI.

For the above and for further reasons considered below, I do not credit Jacob where his testimony meaningfully conflicted with that of other witnesses to this proceeding.

<sup>101</sup> Jacob's only two certifications were in 1980 and 1984.

<sup>102</sup> I accept Jacob's undisputed abilities to capably fit pipe and to do stick, M.I.G. and T.I.G. welding. His pipefitting and welding activities were not factors either in his 1995 termination by DMC or in his not having been hired by TI in 1997.

(b) *TI's failure/refusal to hire Jacob in 1997*

Jacob also had to retreat from his initial testimony that, before applying for work at TI in August 1997, he had worked for that company on four jobs during 1994 and 1995, but had not worked for TI in 1996. This initial account suggested a somewhat enhanced pre-1997 employment relationship with TI in the more distant past. However, it did not indicate TI's difficulties created by the circumstances of his prior abrupt departures from its employ. Each of Jacob's unexpected quits, in June and September 1996, had generated problems for TI with its affected client contractors. These dual incidents had moved TI, in 1996, to list him for future use "as a last resort."

The General Counsel correctly points out that Jacob's sudden departures had been consonant with the Employee Acknowledgment Form, which TI's employees signed to acknowledge their receipt of TI's policy manual. Language on this form permitted TI's employees to resign at will for any reason without giving advance notice. Even so, in real terms, this was a deviation from employment obligations as generally recognized and practiced in the business world. Parties to an employment, or any relationship, for it to work, must rely on each other in traditional ways to fulfill mutually made commitments. It, therefore, reasonably could be anticipated that an employee who had made repeated use of this technical rule by peremptorily quitting jobs without giving meaningful advance notice, when reapplying, might not be well received by prospective employers who previously had been let down by such conduct. Accordingly, I credit Paulen's testimony that all TI employees, when oriented, were asked to give 2 weeks notice before leaving a job because to do so made sense. Regardless, Jacob, at first, benefited from the cited manual policy as his precipitate departure in June 1996 did not prevent TI from re-employing him less than 2 months later. As noted, about 6 weeks after that, he again left abruptly.

Jacob's claim that TI would not later rehire him when he re-applied for work there in 1997 because TI had represented itself to him as a nonunion employer; because of his union activities at DMC; and because he had "cost DMC a N.L.R.B. case," is not credited for reasons beyond his generally shaky testimony. The record shows, contrary to allegations of antiunion animus, that TI had hired Jacob in June 1996 even though his resume there specified that Local 166 had certified his journeyman's status. TI thereafter had referred him for work to contractor clients in June, August and early September of that year, even sending him to a job that had paid the higher prevailing rate. Although his work apparently was well regarded, Jacob's second abrupt resignation had caused TI's Paulen to record in 1996 that he be used in the future only "as a last resort." Since Jacob, in his interview, resume and job application to TI, had not included his prior employment with DMC, there would have been little surface reason for a TI representative to have asked Jacob in 1997 if he had any prior problems with Dilling and to specifically check Jacob out with DMC. There is no contention or proof that TI, before referring Jacob to any other job, had asked if he had difficulties with the intended contractor. There also is no evidence that TI had attempted to obtain any other contractor's advance approval of Jacob before referring him. Moreover, consistent with Paulen's testimony, there

is no showing that TI had hired anyone in March or April 1997 when Jacob was informed that TI had no openings. TI's hiring activities did not pick up until late in June 1997. By then, under TI's existing policies, Jacob's application, in the absence of any follow up effort, had become inactive.<sup>103</sup> Since Jacob was not then on its available list, from its prior experiences with him, TI might not have been motivated to independently seek Jacob out when its need for workers later increased.

In *FES*,<sup>104</sup> issued since the close of the hearing and the receipt of briefs and which redefines obligations of proof where job applicants are not hired or considered for hire in alleged violation of the Act, the Board majority held that to:

... establish a discriminatory refusal to hire, the General Counsel must, under the allocation of burdens set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), first show the following at the hearing on the merits: (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. Once this is established, the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation. . . . In sum, the issue of whether the alleged discriminatees would have been hired but for the discrimination against them must be litigated at the hearing on the merits.

If the General Counsel meets his burden and the respondent fails to show that it would have made the same hiring decisions even in the absence of union activity or affiliation, then a violation of Section 8(a)(3) has been established (footnotes omitted).

From the credited evidence, noting that although the General Counsel established that Jacob had the skills necessary to work in pipefitting/welding assignments for TI's contractor clients, there was no convincing proof that TI had declined to rehire Jacob for such job referral in 1997 because of antiunion animus. In this regard, I do not find that any TI representative had violated Section 8(a)(4) and (1) of the Act by telling Jacob, when he inquired about work that year, that TI would not hire him because he had caused problems with Dilling; or because

<sup>103</sup> TI classified its employees as working or inactive. When a client contractor no longer needed an employee, TI instructed the employee to call in during certain hours for a new assignment. If work was available, the employee would be referred to a different contractor. If the employee did not call in, he became inactive. Also, employees who stopped working for TI without having been discharged for cause, were considered inactive. Inactive employees, who could retain that status with TI for years, became eligible for referral when they called the local TI recruiter and announced their availability for new assignments. To then retain status on the available list, the worker would have to follow up by calling TI "at least once a week."

<sup>104</sup> 331 NLRB 9, 12 (2000).

he had cost Dilling a N.L.R.B. case. I further find that TI, by its representatives, did not violate Section 8(a)(3) and (1) of the Act by telling Jacob that, because Dilling and TI were strictly nonunion, they did not want any union employees. Also, no merit has been found above to the Section 8(a)(1) allegation that when, in late June 1997, TI accepted the transfer of DMC employees to its own payroll, that company, by Morris, had then told those employees that DMC was using TI in order to avoid having to hire union members. While DMC, in substantial part, did implement the transfer for that reason, contrary to the General Counsel, there was no evidence that Morris, or any other TI official, actually had made the alleged statement to employees, or uttered words to that effect. Also, as noted, TI's early knowledge from Jacob's April 1996 resume that his journeyman's status had been certified by Local 166 did not prevent TI from hiring him in 1996 or from referring him to jobs which provided premium prevailing rate compensation. Jacob's difficulties in its standing with TI, as noted, were self inflicted.

This absence of credible animus on the part of TI makes it unnecessary to dwell on the absence from the record of evidence concerning TI's hiring activities during March or April 1997 when Jacob was actively applying there.<sup>105</sup> The earliest submitted evidence concerning TI's 1997 hiring activities began on June 27. This evidence postdated Jacob's communications with TI in this regard. Absent animus, there also is no basis for finding that TI had some continuing obligation to find work for Jacob in 1997 after his application had become inactive under TI's established procedures.

As the General Counsel did not prove either TI's animus or its knowledge of Jacob's prior employment at DMC when it declined to hire him in 1997, as required to make out a prima facie case of failure to hire under *FES*,<sup>106</sup> the burden did not shift to TI to show that it would not have considered Jacob for hire in 1997 even in the absence of his union activity or affiliation. Accordingly, I find that TI did not violate Section 8(a)(1), (3) and (4) of the Act by not hiring and referring Jacob for work when he applied for same in 1997.

#### (c) DMC's 1995 discharge of Steven Jacob

However troublesome so much of Jacob's testimony was, the weight of the record evidence does indicate that DMC, in the aftermath of the dropped crane load, unlawfully terminated him on May 15, 1995. It is undisputed that the dangerous event did occur and it is beyond argument that whoever was responsible had committed a dischargeable offense. However, DMC has not meaningfully established in the record that it was Jacob who had caused the failed lift.

Under *Wright Line*, supra, the General Counsel demonstrated in his direct case that DMC, both in DMC I and, as found above in the present matter, had evidenced pronounced antiunion animus. Against that background, it was undisputed here that

<sup>105</sup> Because Jacob's testimony concerning the relevant dates of his involvement with TI, inter alia, was so inaccurate, as were his general attestations, I credit Paulen and Morris that their contacts with Jacob concerning employment had been in March or April 1997, as opposed to Jacob's account that his communications in that regard had been made in August of that year.

<sup>106</sup> 320 NLRB at 444.

Jacob, disappointed in his efforts to become a DMC supervisor, had become an overt union supporter, attending union meetings and wearing union paraphernalia to work. DMC supervisors saw him wear the union logos on the job. Whatever his other problems, as noted, Jacob's work skills at both DMC and TI generally were beyond reproach and his testimony that he previously had participated in many such crane lifts was unrebutted.

Jacob, at the hearing and in his relevant pretrial affidavit, swore that General Foreman Fulford worked with him to prepare, or rig, the load for the lift—Jacob on one side, Fulford on the other. As noted, on the stand, Jacob principally blamed Fulford for the dropped load. Jacob charged that Fulford, whom he described as being in charge of the process, had directed that the lift resume over his warning after it had initially slipped. In his affidavit, while reserving blame for Fulford, Jacob mostly reproved the crane operator. As also noted, Jacob's affidavit differed from his hearing testimony in that the affidavit did not specifically state that Fulford had been in charge of the lift; that the lift had dropped some before Fulford, over Jacob's warning, had directed that the lift resume; and that only then had it crashed. However, Jacob, notwithstanding these important details, had been consistent in placing Fulford as part of the lift team. He also had been consistent in his account of his terminal conversation with Beecher, when he blamed both Fulford and the crane operator, but was told that he would be Beecher's "fall guy." The raised presence at the lift site of Fulford, as general foreman, raises a question as to who had been the senior member of the lift team. At this point, DMC acquired the burden of showing that it reasonably had concluded that Jacob was responsible for this mishap and, accordingly, that it would have terminated him even in the absence of his union activities.

However, DMC's evidence did not meaningfully contradict Jacob's account. While I accept Dilling's unrefuted testimony that he was called by SDI's owner, Pushis, after the accident with directions to find and get rid of whoever was responsible and that he had passed this directive along to Beecher, that was the end of DMC's convincing evidence on this issue. As Fulford was not employed by DMC at the time of the hearing, I draw no adverse inference from his failure to testify. However, Beecher, who did not arrive on the accident scene until after it had occurred and who, unlike Jacob, had not been an eye witness to the incident, imprecisely described the alleged investigation which followed and which led to Jacob's discharge.

Beecher related that, when he arrived at the jobsite in response to Fulford's call after the accident, a joint DMC–SDI investigatory panel was promptly set up to find out what had happened. This panel consisted of Beecher, Fulford, and Bill Powers. Beecher described Jacob as the leadman who had made the lift with the assistance of two helpers. According to Beecher, the panel interviewed his two helpers. One helper allegedly had aided Jacob in rigging the load before liftoff while the other was the crane operator. Contrary to Jacob, Beecher maintained that Fulford had not been involved in the lift and had not been in the immediate area when it took place. However, regardless of how central Fulford assertedly had been to the immediate incident and, as general foreman, to the overall project, he was appointed to investigate his own operation.

In the meantime, the panel reached its conclusions clearing Fulford without having communicated with Jacob during the investigation.

Beecher went on to testify that the panel, in making its inquiries, also spoke to SDI owner Pushis; to Newburgh Perrini's foreman and to one of that company's laborers who, assertedly, "had seen the whole thing." However, except for Pushis who apparently had been angry from afar, Beecher did not identify by name one witness who had been interviewed during the course of the panel's investigation. Accordingly, Beecher did not name any of the members of Jacob's asserted crew whom, he claimed, had worked with Jacob in making the lift—not the assistant rigger, not the crane operator and not the installation workers waiting for the load in the ditch. He also did not identify the Newburgh Perrini foreman or that company's laborer "who had seen the whole thing." This ambiguity prevented the General Counsel from seeking to examine any actual DMC witness to the accident as none were named and none were produced. While DMC, through Beecher or any other witness of its choice, was entitled to explain the reasons for Jacob's termination, the resultant narrative, since offered for its truth, did not rise even to the level of hearsay since it did not identify any out-of-court communicants.

DMC did not present any payroll records for the day in question, which would have been the best evidence of Beecher's contention that Jacob then had been a lead man earning a dollar/hour more than the other journeymen pipefitter welders on the job. Had this been done, proof of such higher earnings could have indicated that Jacob, in fact, had been a leadman with special responsibilities on the day of the accident. In addition, contrary to DMC's general penchant for careful record keeping as evidenced in other areas of this proceeding, Beecher furnished no written report of the investigation results that was more specific or more convincing than was his testimony. As noted above in the factual discussion, on a single sheet of DMC stationery, headed "Employment Report of Steven Jacob," were stacked two above-described unsigned, squib paragraphs relating to two incidents where Jacob assertedly had been at fault—the terminal occurrence and one alleged to have happened on April 14, 1995. That report was not credited as it related to either episode.<sup>107</sup>

Although Beecher testified in convincing detail as to how the lift inappropriately had been made at an angle, rather than vertically, thereby cutting the crane cable and causing the load to fall, this evidence merely illustrated how the accident may have occurred. It did not enlighten as to whether Jacob, Fulford or some third party, such as the unnamed crane operator, was responsible. Therefore, DMC did not establish at the hearing that it had a reasonable basis for concluding that Jacob had caused the lift accident and that it had terminated him for that reason. Although Jacob was the only eyewitness to the accident whom Beecher could identify, he also was the only one whom Beecher did not interview during the investigation. Accordingly, DMC's stated ground for discharging Jacob was pretextual. In so concluding, it is noted that General Foreman Fulford was included as a member of the investigatory panel although

<sup>107</sup> See footnote 92, *supra*.

his involvement in the incident was at issue, or would have been had the panel spoken to Jacob as part of its probe.

For the above reasons, having found that the General Counsel had established in his direct case under *Wright Line* that, in the context of DMC's pronounced antiunion animus and Jacob's overt union activities, that DMC had discharged him because of these protected pursuits, the burden shifted to DMC to establish that it would have fired Jacob even in the absence of those union activities. I find that DMC has failed to rebut the General Counsel's case by showing that Jacob would have been terminated on May 15, 1995, absent his openly expressed support for the Union. Therefore, DMC, on that date, violated Section 8(a)(3) and (1) of the Act by discharging Jacob.

(7) DMC's 1995 indefinite layoff of Cortney Wheeler—  
discussion and conclusions

The testimony concerning Cortney Wheeler was centered on whether DMC had unlawfully laid her off indefinitely less than 3 weeks after the start of her employment there because of her support for the Union or, justifiably, because her welding capabilities had not been adequate to meet its needs. Beecher testified that DMC had laid Wheeler off because it then had no further need for the simple socket welding she had been capable of performing; because she was too highly paid for her limited welding skills; and because Wheeler, in effect, had forced DMC to act by resisting efforts to place her in a lesser-paid helper's position. The General Counsel, arguing that such criticisms of Wheeler's work were pretextual, presented Jacob and Rentfro who, from their respective observations and from Rentfro's testing, testified that Wheeler had been an above average welder. As noted, I have accepted the General Counsel's representation that Wheeler, for good cause, had been unable to testify on her own behalf.

Notwithstanding these arguments, my conclusions concerning Wheeler's layoff must be based, not on whether her welding skills had been sufficient to sustain a finding that her separation was pretextual, but on the fact that the record contains no evidence that DMC's management or supervision knew, or had reason to know, that Wheeler had been a union supporter prior to her layoff.

The General Counsel, through Jacob, established that early during Jacob's brief employment at DMC, he successfully had brought to DMC's payroll at its SDI jobsite approximately 12 employees, including Wheeler. Jacob related that he had done this in the course of repeated efforts to become a DMC supervisor. Jacob had been motivated in this regard by Bunn's statement during Jacob's initial interview, that a supervisory position could open up for Jacob at the site if Jacob could sufficiently build up the work force there by bringing in additional workers.

Later, when Jacob came to believe that DMC would not make him a supervisor regardless of his work experience and the number of employees he had brought to the job, he contacted the Union and attended several meetings conducted by Long. Jacob testified that, at their first encounter, Long gave him union paraphernalia in the form of t-shirts and buttons which he thereafter wore at work. Jacob also named various DMC supervisors who had seen him display these items on the

job. However, although Jacob also related that the other 12 employees he had brought to work for DMC, including Wheeler, also attended at least two union meetings with him, Jacob did not testify that Wheeler or any of them had exhibited any union logos while on the job. There is no evidence that DMC's officials had any knowledge of the union meetings described by Jacob or who had attended them. Since no evidence is spelled out in the record that Wheeler had received and/or worn any union emblems while at work for DMC nor that DMC's officials had known that she had gone to the union meetings, there is no direct evidence that DMC representatives had been aware of her union activities before indefinitely laying her off.

In the absence of proof of any direct DMC knowledge of Wheeler's involvement with the Union, there also is no basis for inferring that DMC could have had such an awareness.<sup>108</sup> Although Jacob did bring in Wheeler to work for DMC as but one of approximately 12 employees whom he, by his own count, had successfully recommended that DMC hire at the time, this association should not have caused DMC's officials to automatically connect her to the Union. As Jacob had brought these workers, including Wheeler, to DMC as part of his campaign to become a supervisor, his orientation at that time had been openly pro-management. Therefore, I find that DMC had no reason to associate the Jacob sponsored employees, including Wheeler, with the Union.

The record also does not warrant inferring that DMC thereafter should have connected Wheeler to Jacob's union activities after such activities later began because, by the time of the hearing, the two had become engaged. The record does not show that they, as yet, had entered into that relationship when they worked for DMC. While Jacob was vague as to just when he and Wheeler were engaged, Jacob estimated in his April 1999 testimony that they had become so about 2½ years earlier. Accordingly, by Jacob's recollection, he and Wheeler did not become engaged until about 1½ years after their respective May 1995 departures from DMC's employ. While Wheeler, like the other approximately 11 workers whom Jacob brought to DMC in search of his supervisory position, had worked with Jacob on prior jobs, so had the others so situated.

So, while the relationship between Jacob and Wheeler may have matured by the time he testified at the hearing in this matter 4 years later, the record contains no evidence that, in May 1995, DMC had had grounds to consider Wheeler as being more than just one of the dozen employees whom Jacob had brought to work on its SDI jobsite. There is no allegation that any of these 11 other employees whom DMC had hired on Jacob's recommendation, and who assertedly also had attended the union meetings with Jacob and Wheeler, been subjected to unlawful termination or other job discrimination.

Therefore, while the General Counsel has established

<sup>108</sup> The evidence that DMC officials while on the job had observed other above named employees, such as Collins, Sexton and, of course, Jacob, wearing union paraphernalia given to them at union meetings they had attended, creates some suspicion that Wheeler, too, might have so received and worn such insignia at work. However, suspicion is not tantamount to proof and, absent specific evidence of same in the record, this critical element cannot be implied.

DMC's general antiunion animus and Wheeler's presence at two union meetings with DMC employees, he did not prove that DMC had known, or should have known, of Wheeler's union activities or sympathies when it released her. Absent that basic element, I find that the General Counsel did not present a prima facie case under *Wright Line*, supra, that DMC had indefinitely laid Wheeler off in violation of Section 8(a)(1) and (3) of the Act.

(a) *DMC's failure to hire Union-referred job applicants*

(i) The refusals to hire in 1995—facts

Union Organizers Long and Zimmer testified that on about April 25, 1995, they drove to DMC's Logansport office to try to get that company to hire Zimmer. When they arrived there, Zimmer went inside while Long remained in the car. Zimmer, through an office window, asked the receptionist if DMC was hiring. The receptionist answered yes and gave Zimmer a job application form. Zimmer took this form to a small side room.

Zimmer related that while he was seated in the side room filling out the application form, a man, whom Zimmer later came to recognize as Richard Dilling, entered, sat down and asked Zimmer questions about himself. Zimmer told Dilling that he was a pipefitter from Tennessee,<sup>109</sup> looking for work. When Zimmer reached the point in the application that called for a listing of his prior employers, he told Dilling that he had that information back in his hotel room. Zimmer asked if he could take the application with him and bring it back at a later time. Dilling agreed.

Zimmer and Long then drove to an office supply store in Logansport and bought a stack of job applications bearing the same form number as the one obtained from DMC. They then went on to Local 166's hall in Fort Wayne where they gave the stack of applications to that union's then Business Manager, Mark Richards. Long asked if Richards had any members who were interested in working for Dilling who were good welders and fitters. He requested that Richards have such people fill out the applications and get them back to him so that the Union could get some people hired at Dilling. The Union needed Richards' people to help it organize. Richards told the organizers that he would take the applications to a union meeting and have the employees fill them out there.

Richards testified that, having received about 50 blank applications forms from Long and Zimmer, in early May 1995, he took them with him to a May 10 union meeting. Although Local 166 president Dan Baer presided over the meeting, Richards, as the Union's chief executive officer, spoke. He told the members that they voluntarily could choose to complete the applications. He encouraged any unemployed members who were interested in going to work for Dilling to pick up an application immediately after the meeting.

Although all of the applications were completed at the May 10 union meeting, only four actually bore that date. Richards explained that he had told the members at that session that they should fill the forms out as accurately as they could, but that if they had a problem with that, they could put down any informa-

tion they wanted. It was up to them if they did not want to name certain past employers or to provide certain data. He did tell the members that they should not all put the same date on the forms because it "would not look right."

Of the approximately 50 forms that Richards passed out, only about 24 were returned completed. The members who had filled out these applications were Steven Baer, Jerry Berghoff, Chris Blaising, Phillip Davis, Bret Finch, Ronald Harding, Paul Herrmann, Matthew Hickey, Edward Hinen, Patrick Hofman, James Kaylor, James Keplinger, Aaron Kerr, Daniel Krill, Leonard LaBundy, Todd Mikel, Kurt Prosser, James Rader, Jonathan Rekeweg, Fred Spade, John Stayanoff, Rogers Summers, Brad Yoder, and Ted Zabel. Richards stored these forms in his office until Long picked them up on about May 26, 1995. While Richards expressed disappointment at being able to get only about half the forms that Long had given him completed, Long seemed pleased.

When Long received the 24 completed applications from Richards on May 26, 1995, he and Zimmer returned to DMC's Logansport office, arriving there at about 11 a.m. They asked a receptionist, who they believed was named Kristen or Krista, if they could speak to Frank Freeman who, they believed, ran that office, but were told that Freeman was not there. They then asked the receptionist if DMC was taking applications for pipefitters and pipe welders at SDI. When she answered yes, Zimmer took an application from her and immediately filled it out using the name of Randall Jackson. Zimmer identified himself to the receptionist as a newly arrived pipefitter. Long and Zimmer then told the receptionist that they had some friends who also wanted to apply, asking if they should have them do so. The receptionist replied yes, DMC needed people. Long then went to the car and brought back the 24 previously completed applications he had received from Richards, which he also gave to the receptionist. She responded, "Oh, great," stating that she would put the applications on Freeman's desk. Long and Zimmer, however, could not see the receptionist bring the applications to Freeman's office. According to the union representatives, including Zimmer's application under the Randall Jackson alias, a total of 25 job applications were submitted to DMC that day.

About 1 week later, Long and Organizer David Gillespie, using a checklist, made the first round of telephone calls to all those who had completed the job applications submitted to DMC. The two men made a second round of calls to these individuals in late June 1995. They learned that DMC, in spite of the receptionist's reassurances that the company then was seeking needed workers, had not contacted any of these applicants concerning employment. Long did not communicate with DMC with respect to the status of the applications.

The General Counsel, in support of his contention that DMC had unlawfully refused to hire these applicants, argues from a printout of DMC's payroll records from May through December 1995, that DMC had hired 176 pipefitter employees in that period. In an appendix to his brief, the General Counsel listed the names of these hires, including when they first appeared in the voluminous payroll record. This number would be somewhat reduced because, since several of the names that the General Counsel had listed also had been identified in the record as

<sup>109</sup> Zimmer explained that he had picked Tennessee because many of those whom DMC had hired had been from the south.

supervisors, their positions would not have been available to these applicants. The listed supervisors included Dennis Beaton, Stanley and Paul Beecher, Ricky Colwell, and Jim Fulford. Also, Jacob, while testifying for the General Counsel, had described Plomer (Plumber) Barnes as a supervisor.<sup>110</sup>

Although job applications were hand delivered to DMC's office on about May 26, 1995, none of the employees indicated in the General Counsel's summary of DMC's hiring activities appeared in the payroll records until July 3, 1995.

The payroll records, themselves, besides indicating the various employees' work classifications, job assignments and their locations, pay rates, overtime and other details affecting net compensation, do not specify the various employees' dates of hire. In terms of chronology, the records merely indicate the dates of the various computer runs which make up the records printouts. The first such run shown was on July 3, 1995, followed that month by additional runs on July 10, 15, 24, and 31. Accordingly, when the General Counsel, in his summary list, noted that various employees first appeared in the record on July 3, 1995, his reference necessarily had to have been to the date of that earliest printout run. Thereafter, apparently by comparing the names on the consecutive printout runs in July and during the months that followed, and by identifying names that had not appeared in each preceding run, the General Counsel was able to indicate individuals whom DMC had hired in relevant work classifications during the last 6 months of 1995. Under this method, the earliest available indication from the submitted records as to when anyone had been newly-hired could not have come before the second, July 10, computer run. At that time, it could be possible to find new names not on the original July 3 run. As the General Counsel argues, the records show that during the last 6 months of 1995, DMC filled more than enough job vacancies to have accommodated all those on whose behalf the Union had delivered applications on May 26. However, these records do not specify whether DMC had hired anyone before July 10, more than seven weeks after the applications were left with DMC. Therefore, whatever might be suspected in this regard, it was not evidentially established that DMC actually had hired any new employees between May 26, when the Union delivered the applications to DMC, and July 10, when it first became possible to identify new employees from the presented payroll records.

In response, Dilling testified that DMC had not received the May 1995 applications that the union representatives claimed they had delivered, pointing out the absence of direct evidence that the applications actually had been given to any responsible official capable of acting for DMC. In this regard, DMC noted that the union representatives had not seen the unidentified low level employee at the receptionist's window, to whom they assertedly had given the applications, actually hand them to any DMC official authorized to hire employees. Beecher, too, averred that the applications had not been received. Denying that it then had employed anyone at the Logansport office named Kristen or Krista, as Long and Zimmer had attributed, DMC also questions the identity of the individual with whom

they were to have left the application.

Dilling related that DMC generally still accepted applications in the spring of 1995, all of which were sent to him upon receipt. These were kept on Dilling's desk for 7 days and then were destroyed. Had the applications in question been received, under this protocol, they would have been given to him and he would have kept them for the described period. As Dilling denied having seen these applications, Dilling was certain that they had not been submitted to his company.

Also, as described by Dilling and Beecher, under DMC's practice of hiring only workers who had been referred by, or who had been given references from, people DMC management knew and could check with, these unsolicited applicants who did not fit that description, would not have been hired in any event. This longstanding policy concerning DMC's treatment of job applications had been posted in the lobbies of its Logansport and Fort Wayne offices, had been printed on the application forms, and already was in effect when Beecher joined DMC in 1990.

#### (ii) The refusals to hire in April 1997-facts

##### *The April 4 job applications*

Union Organizer Jeffrey E. Jehl testified that he first visited DMC's Logansport office on April 4, 1997, when he went there accompanied by two Local 166 members, Merlin Rice and Dennis Mulford. Two of the men were wearing union t-shirts and all three wore baseball caps with union insignia. They asked Personnel Manager Shirley Ott, who then was at the receptionist's desk, if DMC was accepting applications for employment. When she answered yes, Jehl told her that they would like to fill out such applications. Ott gave the men three applications and sent them to a side room to complete them. When the applications were finished, they returned them to Ott, asking if the forms had been filled out correctly. Ott looked at them and said that they were.

Although no copies of the asserted April 4 applications were entered into the record, in the absence of a corresponding "best evidence" objection, I will accept Jehl's oral account of what occurred that day as consistent with his description of subsequent efforts that month to the same effect, as described below.

##### *The April 10 job applications*

Jehl related that he next returned to that DMC office on April 10, 1997, with Rice, Mark Coil and Pat Garrett, all of whom then were wearing baseball caps with the union logo and t-shirts with the legend, "Union, Yes." They spoke to an unidentified receptionist, asking if DMC was accepting applications. The receptionist said yes and gave them the application forms. She asked if they wanted to fill them out there, or to do so elsewhere and bring them back. Jehl and the others elected to leave with the applications to bring them back.

The four men then went to the Logansport library, completed the applications and photocopied them there. They then returned to DMC's office.

While Coil and Rice waited in the car, Jehl and Garrett went back to the DMC receptionist's desk which, by then, was occupied by Shirley Ott. Jehl asked if it was all right if they also handed in the applications of their buddies who were out in the

<sup>110</sup> It was not necessary to determine whether Barnes was a DMC supervisor and/or agent in order to resolve the issues of this proceeding.

car. Ott replied yes, no problem. Accordingly, Jehl handed Ott his own application and those of Coil and Rice, while Garrett gave Ott his own application. When Jehl asked if the forms had been properly filled out, Ott looked at them and said that they were. Jehl and Garrett then left the office.

#### *The April 16 job applications*

Jehl's third visit to DMC's Logansport office came on April 16, 1997, when he returned there alone, bringing with him a group of applications for work at DMC. These had been completed and signed in his presence the previous morning by Coil, Garrett, Leonard LaBundy, Jeffrey Ryan, and by Douglas Jehl, Organizer Jehl's younger brother. All of these forms had been dated April 16, 1997. Jehl related that he arrived at DMC wearing his union shirt and hat.

Shirley Ott again was at the receptionist's window. Jehl asked if DMC still was taking applications and if he could fill one out. When Ott said yes, Jehl completed his application in the office lobby area and handed it back to Ott, asking if it looked okay. Ott replied that it did. He then asked if it was all right if he handed in applications for some of his buddies since he had done so the previous week. Ott again said yes. Jehl then handed Ott the four other applications. In answer to his query, she told Jehl that they had been filled out okay.

Jehl also asked if he could speak to someone from personnel. Ott replied that personnel spoke to people only after they were hired, not before. She promised to make sure that personnel received the applications he just had handed in.

#### *The April 22 job applications*

Jehl testified that he next returned to DMC's Logansport office on April 22, 1997, at 11 a.m., bringing with him the job applications of Elmer Young, Ronald Woods, Scott Scovine and, again, of Douglas Jehl. These all had been filled out in Jehl's presence at the Cameron Hospital, Angola, Indiana.

Upon his arrival there, Shirley Ott again was at the receptionist's window. When, in answer to his inquiry, Ott confirmed that DMC was accepting job applications, Jehl asked if he could fill one out. Jehl again did so in the lobby area and returned it to Ott, asking if it had been filled out correctly. Ott said that it was. Jehl then told Ott that he had some more applications from friends who were looking for work. When Ott said okay, he handed her the applications he had brought with him, asking if they had been correctly filled out. Ott replied that it appeared that they were, ending the conversation.

Jehl averred that DMC did not thereafter contact and offer work to either himself or to any of the above named individuals who, through Jehl or personally, had submitted their job applications to that company during the four April 1997 efforts.

Jehl testified concerning the qualifications of the workers who had applied with him at DMC that April. When he chose these individuals to apply, he knew that Rice, Garrett, Coil, and Mulford all were Local 166 journeymen pipefitters. Except for Coil, Jehl had worked with the other three "numerous times."

Young and Woods each had been members of Local 166 for nearly 30 years and were experienced pipefitters. Scovine had

started his apprenticeship the same time as had Jehl<sup>111</sup> and Douglas Jehl was a journeyman pipefitter with 15 years in the local.

Ott did not refer to these April applications during her testimony at the hearing.

#### *The June postsettlement job applications*

Union Organizer Long testified that, pursuant to the terms of the May 20, 1997, settlement which, among other things, had required that the Union submit new job applications to DMC by June 10, 1997, he picked up a new set of applications, completed for that purpose, at the Local 166 hall. John Hampton, who had replaced Mark Richards as that local's business manager in June 1997, gave him these new applications. Most were dated between June 4 to 9. Long related that the Union had been notified in advance that new applications were needed under the settlement and that Jehl and Hampton had worked together to collect them.

The applications which Long obtained from Hampton in June 1997 essentially were from the same applicants whose completed job forms he and Zimmer had submitted to DMC two years before. Only two of the May 1995 applicants, Brad Yoder and Jerry Berghoff, did not reapply in 1997. Accordingly, they were not again included.<sup>112</sup> Excluding Yoder and Berghoff, the 23 applications submitted to DMC in June 1997 were those of Steven Baer, Chris Blaising, Phillip Davis, Bret Finch, Ronald Harding, Paul Herrmann, Matthew Hickey, Edward Hinen, Patrick Hofman, James Kaylor, James Keplinger, Aaron Kerr, Daniel Krill, Leonard LaBundy, Todd Mikel, Kurt Prosser, James Rader, Jonathan Rekeweg, Fred Spade, John Stayanoff, Rogers Summers, Ted Zabel, and Union Organizer Malcolm Zimmer.<sup>113</sup>

Long testified that he then had mailed these 23 job applications either to DMC, or to that company's attorney, Michael I. Einterz, in two postings "sometime in June." Long did not recall whether he had sent the applications by registered mail, by Federal Express, or by regular mail. Long did recall having been orally assured that the applications were received. However, he could not recall whether such acknowledgment had come from someone at DMC or from Einterz. No cover letters or return receipts were introduced at the hearing to establish when the applications were sent or their delivery date. DMC denies having received the applications.

As to DMC hires in 1997, the General Counsel introduced another voluminous DMC payroll record printout for the period from April through June 1997, consisting of six computer runs

<sup>111</sup> A pipefitter before he became an organizer, Jehl has been a member of Local 166 since 1978.

<sup>112</sup> Zimmer's June 9, 1997, application was included among those which Long forwarded to DMC that month. Incongruously, this group of applications included one from Chris Blaising, dated May 5, 1997, predating the settlement, and from Patrick Hofmann, dated July 8, 1997, almost a month after the applications were due under the terms of the settlement agreement. Long characterized these off dates as mistakes.

<sup>113</sup> Zimmer's May 1995 application, which had been among the 25 submitted to DMC that year, had been completed under the name of Randall Jackson. His June 1997 application, as given to DMC, bore his own name.

respectively made on April 7, 28, May 19, June 2, 9, and 16. From a like list also appended to his brief, summarizing these records, the General Counsel argues that, as of April 7, 1997, there were 78 employees, marked "PLUMB," for plumbing, or pipefitting trades, under the work classification heading. The General Counsel further indicated that DMC thereafter hired 14 additional employees in that category through June 30, 1997. As the General Counsel broke down these hires, after showing from the first April 7, computer run that DMC then had employed about 78 relevant employees,<sup>114</sup> by comparing that complement against those on the next, April 28, run, two new hires were discerned—James and Thomas Hankins. The May 19 run produced five new employees; the June 2 and 9 runs, one new hire each; and, respectively, four new names and one more on the June 16 and 30 runs.

However, in late June 1997, DMC's payroll records lost their primacy as an information source for DMC's hiring of field personnel. This is because DMC, having by its June 2 contract reaffirmed TI as its exclusive referral source of relevant workers for DMC's projects, began to then use TI's Morris to hire such employees. Morris' efforts in seeking to hire employees for TI and then referring them to DMC, whether or not successful, would not be entered into DMC's payroll records. DMC's records also would not contain entries for the field personnel it had transferred to TI's direct payroll starting on June 27, 1977.

In response, DMC again denied having received the applications. DMC also pointed out that since at least two applications had been dated as of June 9, it would have been difficult for the Union to have sent them to DMC in time for the June 10 deadline established in the settlement agreement. Finally, DMC contends that, notwithstanding the work classifications shown in its payroll records printout, it had hired only temporary summer help.

(iii) DMC's refusals to hire in 1995—discussion and conclusions

Contrary to DMC, I credit the testimony of Long and Zimmer that they did collect and hand deliver the May 1995 applications to DMC's main Logansport office late that month. Long, Zimmer, and Richards described in convincing detail the steps that were taken to obtain the type of application forms that DMC used and what was done to have those forms replicated, completed, gathered and delivered to DMC's receptionist. It would contradict reason to find that the Union which, as considered here, had expended so much effort and resources to organize DMC's employees, would collect these applications in furtherance of that goal and not deliver them.

DMC's denial that it had received the unsolicited applications is consistent with its practice of virtually disregarding them in its hiring process. I find no merit to DMC's contention that the receptionist with whom the union representatives left the applications was not DMC's authorized agent for purposes of accepting delivery. Whether or not Long and Zimmer properly recalled her name on short acquaintance, she was the individual whom DMC had placed in the receptionist's main office

window to meet in first instance with the public and to accept on her employer's behalf whatever might be delivered to DMC at its principal office. To that extent and for that purpose, the receptionist was DMC's duly designated agent. When Long and Zimmer arrived at that office with the applications, the receptionist was the only DMC representative available. Accordingly, it is of no consequence that Long and Zimmer did not actually see the receptionist give the applications to a higher company official. Ordinarily, a union's delivery of job applications to an employer in the manner followed here is deemed conventional and is admitted.<sup>115</sup> This is not the first time that DMC has been found to have played "loose" with sent communications perceived as being adverse to its interests. As found in *Dilling I*,<sup>116</sup> DMC, in defending against the unconditional offers to return to work made on behalf of its various unfair labor practice striker employees, pretended confusion, "even denying that such offer had ever been made."

I also find no merit to DMC's argument that, under its policy of hiring only individuals referred from sources that DMC managers knew and could check with, these unsolicited applicants, who were not so referred, would not have been hired in any event.

As Administrative Law Judge Kennedy held in his Board approved decision in *Ultrasystems Western Contractors, Inc.*:<sup>117</sup>

I conclude that the evidence is clear that Respondent has in place an unlawful policy designed to screen from employment individuals whom it deems, rightly or wrongly, to be likely to engage in union activity. Moreover, although the practice of hiring from "followings" (individuals who comprised the personal following of a there-identified supervisor and who accompanied him to different jobs) is not unlawful in itself, it is evidence of an affirmative preference for individuals known to be competent and to be free of any union connection (parenthesized material supplied).

As in *Ultrasystems*, DMC, in the context of its above found unlawful conduct and antiunion animus, has used its policy of accepting job applications, of storing them for 7 days and of discarding them in favor of referrals from known sources as a means of screening applicants to ensure that they were not union adherents. Like *Ultrasystems*, such a policy and practice, which could provide a way of better ensuring the quality of the work force, would not be unlawful in itself. However, as DMC used this policy, it was one more effort at effectively guaranteeing that employer would hire only employees who were "free of any union connection."

In reviewing the extent of DMC's animus to warrant a finding that it had used its job applications policy as a screening device, it is worth again noting the above found actions that DMC took right after the settlement to evade the requirement in

<sup>114</sup> This number again should be slightly reduced by the presence of two individuals whom the General Counsel contends were DMC supervisors at the time—Lenis Pipkin and Don Whittaker, Sr.

<sup>115</sup> See, e.g., *Ultrasystems Western Contractors, Inc.*, 310 NLRB 545, 553–554 (1993), enf. denied on other grounds 18 F.3d 251 (C.A. 4, 1994).

<sup>116</sup> 318 NLRB, supra, at 1154.

<sup>117</sup> *Ibid.* at 554.

that agreement that, during a 9 month period, it ultimately hire at least some unionized employees from a preferential list of alleged discriminatees—i.e., TI, DMI, *et al.*

As noted, in addition to the above animus evidenced by DMC's postsettlement efforts to avoid hiring unionized employees, that company has been responsible for the adjudicated violations in *Dilling I*. Violations of the Act found herein, including discharge, confiscation of union literature, threats of unspecified reprisals, coercive interrogation, prohibition against the wearing of union paraphernalia at work; and created impression of surveillance.<sup>118</sup> This background of DMC's unlawful conduct and animus to defeat the unionization of its employees provides context for its use of the disputed applications policy. In practical terms, if DMC were to be permitted to continue to use this policy as it had, that company, by taking on new employees only from known sources, only after putting the relevant questions those sources, potentially could permanently insulate itself against ever hiring union affiliated employees. As this policy, in the described milieu, appears to be unsupportable under *Ultrasystems*, I find that DMC's argument that it would not have hired such employees in any event because of that policy is invalid.

Accordingly, from the credited evidence, the General Counsel, in his direct case, has shown that on about May 26, 1995, Long and Zimmer, acting for the Union, delivered 25 job applications from qualified applicants<sup>119</sup> to that company's duly designated agent for the receipt of deliveries. Since a substantial number of these applications indicated the signers' union apprenticeship and as they had been delivered to DMC en masse, the General Counsel also established that DMC knew, or should have known, that these applications were union associated. As indicated, the General Counsel, also had established DMC's antiunion animus.

Because there is no evidence that DMC had hired any relevant employees until about 7 weeks after the applications were submitted, the General Counsel did not establish that DMC had been actively hiring new workers when the applications were delivered to DMC. Accordingly, absent evidence of hiring when the applications were submitted, subject to the compliance proceeding found appropriate below, I conclude that DMC violated Section 8(a)(3) and (1) of the Act in 1995 by refusing to consider the 25 applicants for hire. Contrary to DMC, the Board has held in *FES*, *supra*,<sup>120</sup> that "A discriminatory refusal to consider may violate Section 8(a)(3) even when no hiring is occurring."

In *FES*,<sup>121</sup> *supra*, the Board majority held that to:

<sup>118</sup> This enumeration does not include violations of the Act to be found below.

<sup>119</sup> Long's undisputed evidence was that he had requested that the Union obtain applications from qualified journeymen. Although not all of the applicants listed their experience on their applications, most did itemize years of work in relevant skills and had identified former employers with whom DMC might check. Accordingly, I find that the applicants' unchallenged professional work qualifications were not factors in DMC's failure in 1995 to hire and refer them to client contractors.

<sup>120</sup> 331 NLRB at 16.

<sup>121</sup> *Supra* at 15.

... establish a discriminatory refusal to consider (for hire) pursuant to *Wright Line*, *supra*, the General Counsel bears the burden of showing the following at the hearing on the merits: (1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment. Once this is established, the burden will shift to the respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation.

If the respondent fails to meet its burden, then a violation of Section 8(a)(3) is established.

In finding that DMC had unlawfully refused to consider these applicants for hire, it is noted that DMC, in response to the General Counsel's direct case, which made out the above elements specified in *FES*, sought to justify its exclusion of these otherwise-qualified applicants from its hiring processes, first, by denying that it had received the job applications and, second, by explaining how, in any event, they would not have been eligible for hire under its screening policy. Since both of these grounds have been found above to be invalid, DMC failed to meet its burden of showing that it would not have considered these applicants for hire even in the absence of their union activities or affiliation.

Although the General Counsel demonstrated from the payroll records that DMC first hired 12 new employees about 7 weeks after it had received the 25 job applications, 13 employees a week later and that additional such work opportunities had subsequently developed during the last half of 1995, the documentary evidence does not show that DMC had been actively hiring new workers when the applications were received.

Nevertheless, my finding that DMC, in 1995, had violated Section 8(a)(3) and (1) of the Act by refusing to consider the 25 applicants for hire must be made contingent upon the result of a compliance proceeding that the Board's decision in *FES*, *supra*,<sup>122</sup> requires the General Counsel to initiate "regarding openings arising before the commencement of the hearing on the merits that he either knew, or should have known, had arisen." *FES*, at slip opinion 7, sets forth the burdens to be met by the General Counsel and Respondent, respectively, in such a compliance proceeding. The Board there noted that "If the Respondent fails to meet its burden, then the discriminatees must be offered the positions in question or, if those positions no longer exist, substantially equivalent positions, and be made whole for any losses suffered as a result of the Respondent's unlawful conduct."

The record shows that well over 25 employment opportunities did open at DMC after the 1995 were submitted and before the start of the hearing. I have found above that the 25 applicants involved here were qualified to capably fill those positions. Since, in any event, I have found that DMC had violated Section 8(a)(3) and (1) of the Act by refusing to consider these individuals for hire because of their affiliation with the Union, I further conclude that it would be appropriate to determine via the Board specified compliance proceeding whether DMC also

<sup>122</sup> *Supra* at 15.

had unlawfully refused to hire the 25 job applicants in the time that followed the delivery of their applications. Such a proceeding would preserve the rights of a group of discriminatees, already disadvantaged by DMC's unlawful refusal to consider them, to a determination as to whether they might be entitled to the more comprehensive remedy resulting from refusals to hire.

(iv) DMC's failures to hire in April 1997—discussion and conclusions

Contrary to DMC's denials, I credit Jehl's uncontroverted testimony that he, either alone or with fellow applicants, had delivered to DMC's personnel director, Ott, at that company's principal office, the appropriately completed job applications for Jehl, Merlin Rice, and Dennis Mulford on April 4; of Rice, Mark Coil, Pat Garrett, and himself on April 10; of Coil, Garrett, Leonard LaBundy, Jeffrey Ryan and Douglas Jehl on April 16; and of Elmer Young, Ronald Woods, Scott Scovine and, again, of Douglas Jehl on April 22, 1997. Jehl's activities in this regard were consistent, not only with his general line of work, but also, more specifically, with the Union's longstanding efforts to organize DMC's employees. Also, although Ott testified at the hearing, she did not deny having received these applications. Accordingly, I find that by April 22, Jehl and his fellow applicants had given DMC a total of 16 applications from 12 individuals, including from Jehl, himself.

The General Counsel in his direct case did establish DMC's conspicuous antiunion animus and that DMC had notice of these applicants' union affiliation. Jehl and the others who personally presented their applications at DMC's office prominently displayed the union logo on their attire, and certain of their applications gave further indication of union apprenticeships. Accordingly, Ott had known of their union affiliation when they applied. The General Counsel further has presented rebuttable, but unrebutted, evidence that the applicants all were qualified to have worked as mechanical trades employees for DMC. Jehl testified that he personally had selected each of them on the basis of their extensive relevant experience. Against this background of DMC's antiunion animus, its knowledge of the April applicants' union affiliations and their described work experience, the General Counsel has provided reason to conclude, in the absence of DMC's evidence to the contrary, that the company would not have considered the applicants even in the absence of their union activities or affiliation.

Again, DMC's payroll records, which the General Counsel propounded, did not show that DMC had been hiring enough employees to have absorbed the April applicants when they actually applied. Except for taking on the two Hankins brothers in the period covered by the April 28 run,<sup>123</sup> DMC did not hire any additional employees until when, as indicated by the May 19 computer run, it brought in five new employees. The hirings indicated by the May 19 run occurred more than 6 weeks after

April 4, when the first group of April applications were given to DMC, and more than 3 weeks after the fourth, April 22, set of applications were turned in to DMC. Except that the General Counsel identified two more new employees on the June 2 run, there was no evidence of further DMC hiring until the June 16 run, when four new names appeared in the payroll record. As will be discussed below, the record beyond these payroll listings shows that DMC's hiring needs, to the extent established in the record, increased in late June 1997. This increase came after DMC delegated its hiring and employment functions to TI. However, all this occurred subsequent to the Union's last April 1997 submission of applications to DMC.

Summarizing, the General Counsel, in accordance with *FES*, has shown in his direct case that DMC has excluded the seemingly qualified April applicants from its hiring processes and that DMC's animus had contributed to its decision not to consider them for employment.

For its part, DMC again failed to meet its burden of showing that these April applicants would not have been considered even in the absence of their union activities or affiliation. DMC did not assert that these, or any other applicants considered herein whom it did not hire, were unqualified to do DMC's work. Rather, DMC principally argued that under its applied 7-day retention period for job applications received from individuals not recommended by sources known to it, to which that company customarily did not resort, these individuals would not have been hired in any event. As this cited policy has been found above to have been used by DMC as an invalid screening mechanism to avoid hiring union affiliated workers, it is not a valid defense.

Having concluded that DMC, in its response to the General Counsel's direct case, did not meet its burden of showing that it would not have considered the April 1997 applicants even in the absence of their union activity or affiliation, I further find that DMC violated Section 8(a)(3) and (1) of the Act by its refusal/failure to consider the April 1997 applicants for employment. This finding applies to all of the above named job applicants whether their applications were presented that month to DMC either personally, or through, Jehl.

However, as indicated, the record again shows that job opportunities with DMC did become available after April 1997 and before the start of the hearing. As will be discussed below under "Remedy," TI's Morris, as DMC's duly designated hiring agent, testified concerning his efforts during a period of approximately 9 months, beginning on June 28, 1997, to obtain the employees seriously needed at DMC's various jobsites. Accordingly, it again would appear that the best way to preserve any possible rights that these April 1997 discriminatees might have to the broader remedy available in refusal to hire, as opposed to refusal to consider for hire, cases, would be through the compliance proceeding described in *FES*, supra.<sup>124</sup> As found above, a like compliance proceeding is also applicable for the May 1995 discriminatees.

<sup>123</sup> James and Thomas Hankins, both members of a pipeline local that was sister to Local 166 when DMC hired them, testified as General Counsel's witnesses. As a result of their testimony, it was found above that DMC had violated Sec. 8(a)(1) of the Act. Accordingly, it is not clear that the General Counsel is contending that DMC should have employed any of the April 1997 applicants before hiring them.

<sup>124</sup> 331 NLRB at 15.

(v) DMC's postsettlement refusals to hire in June 1997—  
discussion and conclusions

Long's testimony as to the details of how and when in June 1997, he mailed that month's 23 job applications to DMC pursuant to the settlement term which called for their receipt there by June 10, was inconclusive and undocumented. He also did not recall who on DMC's behalf orally informed him that the applications had arrived. DMC, in turn, denied having received these applications.

I, nevertheless, credit Long's testimony that he did timely forward the new applications to DMC in June 1997 because DMC, at the time, acted as if it had received them. The continued viability of the preferential list of asserted discriminatees to be hired on the one-for-one basis had been dependent, under the settlement terms, on the timely delivery of such applications to DMC. However, DMC and TI, by the accounts of their own witnesses, never stopped, or attempted to stop, using the list of asserted discriminatees because their underlying job applications had not been timely submitted. Instead, TI's Morris, who became DMC's designated hiring agent, testified that he proceeded to try to hire from the two settlement lists from June 28, 1997, until March 1998, offering employment to every prospective worker he was able to reach.

Because DMC did constitute TI as its joint employer/hiring agent after June 2, 1997, Morris' testimony constituted a DMC admission that, in the months after June 28, 1997, it had a sufficiently strong need for employees to work at its various Indiana projects to have enabled that company to have put all 23 June applicants to work. Morris described repeated efforts to obtain enough workers to fill DMC's requirements in this regard during the last half of 1997 and the first few months of 1998.

Although Morris, in this attributed capacity, was competent to testify concerning what he did to obtain workers for DMC in the relevant period, I do not credit his testimony that he had attempted to put those named on the alleged discriminatees' hiring list to work. As noted, five of the individuals named in that list denied that Morris ever had contacted them for work although all were experienced journeymen. Also, the parties stipulated that the other 17 persons so listed would have testified to the same effect had they been called to the stand. At least some of these workers in the seasonal construction industry could have benefited from such job offers had they been made. Morris, while asserting that he had placed many of these calls from home on his private telephone, could produce no telephone records or other documentation to substantiate his testimony in this regard. As such records could have been used to gain reimbursement from his employer for the many business calls assertedly made in this connection, not all of them local, his explanation that they may have been mislaid during his later move to another state is unconvincing. This gap in documentation presents a stark contrast to TI's detailed recordkeeping in connection with Steven Jacob.

Although DMC might not have been hiring at the precise time that Long mailed the June 1997 applications, those applications continued to be viable in months ahead. This was because in the settlement then in effect, the parties had agreed that the applications and the related union supplied hiring list, *inter alia*, would be used for 9 months. Even with DMC's unilateral

changes to that accord, including the delegation of the employer's performance to TI, DMC then did not independently reduce the effective term during which the lists were to be used by more than 3 months, shrinking that period shrunk to 6 months. Therefore, even as DMC unilaterally reduced the period for preferential hiring, from what was left of the parties' agreement, the June 1997 applicants still reasonably might have anticipated that their applications would be considered and, as applicable, favorably acted upon for some months into the future. Through this prearrangement, their prospects for hire had been specifically intended to be superior. Also, as Morris testified, after June 28, 1997, TI actively hired employees to work on DMC jobsites.

Accordingly, the General Counsel, in addition to the above found DMC antiunion animus, has established that DMC, through TI, had been hiring for its projects during months when the union affiliated applicants were being bypassed. The General Counsel further has shown that the 23 applicants of June 1997, whose journeymen's qualifications for the relevant work was not contested, had a prearranged expectation, based upon the May 1997 settlement that, at least, some would be hired in the future. Finally, the General Counsel effectively has demonstrated from DMC's above found antiunion animus in violation of Section 8(a)(1) of the Act and its postsettlement maneuvering to avoid hiring unionized employees, that such animus contributed to the DMC /TI decision not to hire the June 1997 applicants.<sup>125</sup>

<sup>125</sup> Complaint II, which covers the time period during which, as the General Counsel contends, the 23 postsettlement job applications of June 1997 were submitted to, and unlawfully disregarded by, DMC does not specifically allege that DMC had violated Sec. 8(a)(3) and (1) of the Act by such conduct. The closest that complaint II comes to incorporating this issue on its face is the allegation in par. 5(b) to the effect that DMC had entered into the above May 20, 1997, settlement agreement with no intent of honoring the terms of that settlement and to evade its liability under the Act. DMC's failure to hire any of the June 1997 applicants, of course, is the manifestation of that party's breach. However, since as found above, the General Counsel also was responsible, with DMC, for the failure of the settlement, the General Counsel has been estopped from pursuing the par. 5(b) allegation and so much of para. 9 as alleged the par. 5(b) conduct to be violative of the Act.

Even so, the record does establish that DMC's refusal to hire these June 1997 applicants is but further evidence in support of complaint I, pars. 6(c), (d), and 8, where it collectively was alleged that, since "about May 26, 1995 and continuing to date (emphasis supplied)," DMC "has refused to hire or consider for hire" 25 there named job applicants in violation of Sec. 8(a)(3) and (1) of the Act. With the exception of two applicants from 1995 who did not reapply 2 years later, the 23 job seekers of June 1997 and the 25 discriminatees alleged in complaint I, pars. 6(c) and (d), were the same individuals. They merely had submitted new applications under a settlement arrangement intended to resolve issues created by DMC's failure to hire them in 1995. DMC's continuing refusal to hire any of these workers when they reapplied in 1997, literally at DMC's invitation, gave currency to the complaint I, para. 6(c), allegation that the there alleged discriminatory refusal to hire these applicants, or to consider them for hire, actually has continued "to date."

Therefore, the lawfulness of DMC's failure/refusal, persisting "to date," to hire the 23 job applicants of June 1997, can be considered under the allegations of complaint I, pars. 6(c), (d), and 8.

The burden then shifted to DMC and TI to show that they would have made the same hiring decisions even in the absence of the applicants' union activities or affiliation. DMC sought to defend by pointing out that, virtually, in the immediate aftermath of the settlement, it had stopped hiring and directly employing its own employees and had delegated both functions to TI. TI, in turn, attempted to counter the General Counsel's case by asserting that it, in fact, had done its best to offer jobs to the employees on the two hiring lists appended to its June 2, 1997, contract with DMC. As DMC's defense is based on actions taken in furtherance of its antiunion animus and, as TI's account has not been credited, DMC and TI failed to meet their relevant burdens.

Therefore, in accordance with *FES*, supra, I find that DMC and TI, as joint employers since, at least, May 19, 1997, respectively violated Section 8(a)(3) and (1) of the Act by discriminatorily refusing to hire the above named 23 workers whose job applications were sent to DMC by the Union in June 1997. However, these parties' failure/refusal to hire these workers was principally driven by DMC, the principal Respondent herein and the employer most associated with the animus found in this matter. It is noted that, before complaint II, TI had not been a party to the issues between DMC and the Union and that TI did not become aware until months later that the two preferential hiring lists appended to its June 2 contract with DMC had originated from a settlement agreement. Accordingly, I find that DMC should be held primarily responsible to remedy the monetary aspects of the refusals to hire the June 1997 job applicants, with TI being held secondarily liable.<sup>126</sup>

#### CONCLUSIONS OF LAW

1. Respondents DMC and TI are employers engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. At all relevant times since May 19, 1997, DMC and TI have been joint employers of all nonsupervisory mechanical trades employees, including pipefitters, welders, pipefitter welders and plumbers on TI's payroll, whom TI has referred to work for DMC on that company's jobsites.

4. DMC respectively violated Section 8(a)(1) of the Act by confiscating union literature; by making unspecified threats to its employees in retaliation for their union activities; by creating an impression of surveillance of its employees' union activities; by interrogating employees concerning their union sympathies and activities; and by sending its employees home from work to replace clothing that displayed union insignia.

5. DMC respectively violated Section 8(a)(3) and (1) of the Act by:

- (a) Discharging Steven Jacob because of his union activities.
- (b) By refusing to consider the following May 1995 job applicants for hire because of their union activities and/or union affiliations:

Steven Baer	Daniel Krill
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Jerry Berghoff	Leonard LaBundy
Chris Blaising	Todd Mikel
Phillip Davis	Kurt Prosser
Bret Finch	
Ronald Harding	Jonathan Rekeweg
Paul Herrman	Fred Spade
Matthew Hickey	John Stayanoff
Edward Hinen	Rogers Summers
Patrick Hofman	Brad Yoder
James Kaylor	Ted Zabel
James Keplinger	Malcolm Zimmer, a.k.a
Aaron Kerr	Randall Jackson

(c) By refusing to consider the following April 1997 job applicants for hire because of their union activities and/or union affiliations:

Merlin Rice	Jeffrey Ryan
Jeffrey E. Jehl	Douglas Jehl
Dennis Mulford	Elmer Young
Mark Coil	Ronald Scott
Pat Garrett	Scott Scovine
Leonard LaBundy	

6. DMC and TI, as DMC's hiring and employment agent, jointly violated Section 8(a)(3) and (1) of the Act by refusing to hire the following June 1997 job applicants because of their union activities and/or union affiliations:

Steven Baer	Daniel Krill
Chris Blaising	Leonard LaBundy
Phillip Davis	Todd Mikel
Bret Finch	Kurt Prosser
Ronald Harding	James Radar
Paul Herrman	Jonathan Rekeweg
Matthew Hickey	Fred Spade
Edward Hinen	John Stayanoff
Patrick Hofman	Rogers Summer
James Kaylor	Ted Zabel
James Keplinger	Malcolm Zimmer
Aaron Kerr	

7. The unfair labor practices found above affect commerce within the meaning of Section 2(6) and (7) of the Act.

8. Respondents DMC and TI have not otherwise violated the Act.

#### THE REMEDY

Having found that Respondents DMC and TI have engaged in certain unfair labor practices, they must be ordered to cease and desist and to take certain affirmative actions designed to effectuate the policies of the Act.

Having concluded that DMC has unlawfully discharged its employee, Steven Jacob, on May 15, 1995; that, during and after May 1995 and on and after various dates in April 1997, DMC unlawfully refused to consider a total of 36 above named employees for hire; and that, since June 1997, DMC was the respondent primarily responsible for refusals to hire 23 above named job applicants, all because of their union activities and/or affiliation, I find in the context of DMC's various corporate changes, maneuvers and employee transfers to TI, that a

<sup>126</sup> *Georgia Pacific Corp.*, 221 NLRB 982, 986 (1975).

status quo ante remedy is required to enable the awarding of appropriate reinstatement, instatement and backpay. Having divested itself of its nonbenefited employees and having stopped itself from operating as the direct employer of the mechanical trades employees working on its projects, DMC, were its stratagems in this regard permitted to stand, could evade much of its backpay liability and duty to reinstate or instate employees it had harmed by its unlawful conduct.

Accordingly, I recommend that DMC be required to reopen and reestablish its operations as a mechanical contractor in the construction industry and to again become the immediate employer of its mechanical trades employees, including pipefitters, welders, pipefitter welders and plumbers.<sup>127</sup> This restoration of DMC's mechanical operations to what they were on February 15, 1995, is necessary in order to restore the employment situation to what it had been prior to the commission of DMC's unfair labor practices found herein. This February 1995 restoration date, relating back to when DMC's unfair labor practices began, as opposed to June-July 1997 when that company finally stopped directly employing its mechanical trades employees,<sup>128</sup> is necessary to protect the remedial rights of the discriminatees found herein. In this regard, since it has been concluded above that DMC violated Section 8(a)(1) of the Act in February 1995 and that Steven Jacob was unlawfully terminated in May 1995, there are existing remedial equities that predate June 1997. From 1996 on, DMC, while appealing the Board's 1995 decision in *Dilling I*,<sup>129</sup> incrementally used TI and other manpower referral sources to enable it to directly employ increasingly fewer of the mechanical trades employees utilized on its projects. Accordingly, by 1997, when DMC completely stopped directly employing its own mechanical trades employees, its role as the direct employer of such employees already had been curtailed. Therefore, were DMC to be required to restore its operations as a mechanical contractor only to what they had been in June 1997, when it fully ceased to directly employ mechanical trades employees, the reduced operation by then in place would materially reduce the employment and backpay prospects of Jacob and the other discriminatees found herein.

Even if the General Counsel, for reasons detailed in the record, had not been estopped from impleading DMI as a party respondent and DMC's *alter ego*, the need for a status quo ante remedy still would be the same. This is because TI, and not DMI, remained the direct employer of the mechanical trades employees still working on DMC/DMI projects. After DMI became operational in January 1998, TI merely continued to refer its own employees to DMI, instead of DMC, to work at the same jobs and locations under the same supervision. Accordingly, DMI, like DMC before it, merely became a joint employer with TI of those employees whom TI referred to them. Since no construction work was directly performed for TI, which essentially was a manpower service, TI's employee roster was unstable because it was built around the varying

requirements of its different client contractors. Accordingly, DMI, no more than DMC after its delegations to TI, was situated to respectively reinstate, instate, consider for future hire and adequately make whole the different categories of discriminatees found herein.

Administrative Law Judge Beddow in his Board approved decision in *Lear Siegler, Inc.*, noted that:<sup>130</sup>

The Board has long held that restoration as nearly as possible of the situation that would have prevailed but for the unfair labor practice is prima facie appropriate and that the burden rests with Respondent to demonstrate that it is not appropriate. See *R & H Masonry Supply*, 238 NLRB 1044 (1978); *Rebel Coal Co.*, 259 NLRB 258 (1981).

In *We Can, Inc.*,<sup>131</sup> the Board, reiterating its standard established in *Lear Siegler*,<sup>132</sup> again affirmed that when an employer has curtailed operations and has unlawfully discriminated against its employees with respect to their employment, "the Board's usual practice is to order a return to the status ante quo—that is to require the employer to reinstate the employees and restore the operations as they existed before the discrimination—unless the employer can show that such a remedy would be unduly burdensome."

I find that it would not be unduly burdensome on DMC to require that company to restore its operations so that it again would become the direct employer of its mechanical trades employees to the same extent as in February 1995. DMC's longtime status as a general contractor is not affected by anything here. DMC's later changes during the last half of 1997 and the beginning of 1998, bringing in TI and creating DMI, as found, were improperly undertaken and have abiding consequences.

As to the effect of restoration order on TI, Dilling has given TI whatever contractual standing it may have to hire, refer and to directly employ mechanical trades workers employed at DMC/DMI jobsites. TI's status as DMC/DMI's exclusive source for mechanical trades workers is viable only as long as DMC/DMI is lawfully enabled to continue to receive such referrals. Having found from the credited evidence that TI, as DMC/DMI's joint employer and hiring agent, had unlawfully used its status under that contract to discriminatorily refuse to contact and hire the 23 June 1997 job applicants, I further conclude that TI's conduct, as well as DMC's, has so tainted the June 2, 1997, contract that the agreement should be rendered ineffective to the extent that it conflicts with the remedy found herein.<sup>133</sup>

Also, the ability to restore the status quo ante with respect to DMI also lies within DMC's capabilities. Dilling, DMC's president and sole stockholder, also owns 70 percent of DMI. Since Dilling makes the final determinations for both compa-

<sup>127</sup> Since DMC's former electrical employees were not a part of this proceeding, no finding will be made with respect to them.

<sup>128</sup> Cf. *Lear Siegler, Inc.*, 295 NLRB 857, 861 (1989).

<sup>129</sup> The appeals period before the Courts in *Dilling I* lasted until 1997 when the Supreme Court denied certiorari.

<sup>130</sup> 295 NLRB at 871.

<sup>131</sup> 315 NLRB 170, 174 (1994).

<sup>132</sup> 295 NLRB at 861.

<sup>133</sup> As in *Lear Siegler*, supra, at 861, and in *We Can, Inc.*, supra, at 175-176, DMC may introduce evidence at the compliance stage of this proceeding relevant to backpay, the appropriateness of this restoration order, reinstatement, instatement and consideration for future employment portions of the remedy.

nies, his required inactivation of DMI during the remedial period would be unassailable. While this might create an issue with DMI's mandated minority stockholders and directors concerning any drop in the value of their shares, that is beyond the scope of this proceeding.

As in *Special Mine Services, Inc.*, supra, the restoration order recommended here is not an effort to substitute my business judgment for that of the Employer or to more generally determine how DMC should conduct its business. This status quo ante remedy is based on a determination, from a review of the record evidence, that DMC would not have changed its business operations to the extent demonstrated in the aftermath of the settlement agreement in the absence of the union activities of its employees, of certain of its applicants for employment and of its settlement commitment to hire some of these union affiliated employees over a 9-month period. In the context of its unlawful conduct found herein, no lesser corrective action would be effective.

DMC having discriminatorily discharged its employee, Steven Jacob, on May 15, 1995, must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of his May 15, 1995, discharge to the date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*,<sup>134</sup> plus interest as computed in *New Horizons for the Retarded*.<sup>135</sup> DMC also should be required to remove from its records any reference to its unlawful discharge of Jacob. I note that, at the time of the hearing, DMC/DMI still was at work on the SDI job where Jacob had been employed in 1995. It will be DMC's burden to show during the compliance stage that Jacob, a skilled, experienced pipefitter and welder, would not still be employed there but for his unlawful discharge.

DMC having unlawfully refused to consider for hire the 25 job applicants of May 1995 and the 11 job applicants of April 1997, all of whom have been identified above, that respondent should be required to place these discriminatees in the positions they would have been in, absent discrimination, for consideration for future openings. DMC should further be compelled to consider these individuals for job openings in accordance with nondiscriminatory criteria; and to notify the discriminatees, the Charging Union and the Regional Director for Region 25 of future openings in positions for which the discriminatees applied, or substantially equivalent positions.<sup>136</sup>

These findings of refusal to consider the applicants of May 1995 and April 1997 for hire and the above appurtenant remedies are contingent on the results of a compliance proceeding provided under *FES*, supra, to determine whether these discriminatees would have been selected for openings that arose after their respective applications were submitted, but before the start of the hearing on the merits in this proceeding, absent DMC's proven discriminatory failure to consider them for employment. At such hearing the General Counsel and DMC

would have the respective proof burdens set forth in that decision at slip opinion 7. Should the General Counsel meet his burden, but not DMC, then the discriminatees must be offered the positions in question or, if those positions no longer exist, substantially equivalent positions, and be made whole for any losses suffered as a result of DMC's unlawful conduct.

It further having been found that DMC and TI discriminated against the 23 above named job applicants of June 1997 by unlawfully refusing to hire them, I find that DMC should be required to offer them instatement to the positions for which they applied<sup>137</sup> or, if those positions no longer exist, to substantially equivalent positions. DMC also should be held primarily responsible for making these discriminatees whole for any loss of earnings and other benefits, computed on a quarterly basis from the dates of the respective failures to hire to the dates of proper offers of instatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*,<sup>138</sup> plus interest as computed in *New Horizons for the Retarded*.<sup>139</sup> I further conclude that TI should be held secondarily liable for the backpay remedy.

Because DMC, as determined in the Board's decision in *Dilling I* and by the conclusions reached, has a proclivity for violating the Act, and because of the serious nature of the violations found in this proceeding, including, but not limited to, confiscation of union literature, unlawful interrogation, discriminatory discharge and unlawful refusals to consider for hire, and to hire, job applicants, all because of the discriminatees' union activities and affiliation, I find it necessary to issue a broad Order requiring the Respondent to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act.<sup>140</sup>

On these findings of fact and conclusions of law and on the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended<sup>141</sup>

#### ORDER

A. The Respondent, Dilling Mechanical Contractors, Inc. (DMC), of Logansport and Fort Wayne, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging employees from joining, supporting, or engaging in activities on behalf of Indiana State Pipe Trades As-

<sup>137</sup> Also under the authority of *FES*, the compliance stage of this proceeding may be used to determine the order in which the various discriminatees would have been offered instatement to the various DMC/DMI projects, to which projects, and whether they would have continued to be employed at those or other jobsites to date. Although I have found above that DMI could not appropriately be impleaded as a respondent in this proceeding, it would defeat the restorative remedy herein were DMC to be permitted to end its backpay, reinstatement and instatement obligations with the created appearance of DMI.

<sup>138</sup> 90 NLRB 289 (1950).

<sup>139</sup> 283 NLRB 1173 (1987).

<sup>140</sup> *Hickmott Foods*, 242 NLRB 1357 (1979).

<sup>141</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>134</sup> 90 NLRB 289 (1950).

<sup>135</sup> 283 NLRB 1173 (1987).

<sup>136</sup> As provided in *FES*, supra, at sl. op. 7 fn. 15, DMC will be required to provide such notification until the Regional Director concludes that the case should be closed on compliance.

sociation, United Association of Plumbers and Pipefitters, AFL-CIO, and Plumbers and Steamfitters Local Union No. 166, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, collectively called the Union, by discharging its employees, by refusing to hire and by refusing to consider for hire applicants for employment because of their union activities, sympathies and affiliation.

(b) Confiscating union literature.

(c) Making unspecified threats to employees in retaliation for their union activities.

(d) Creating impressions of surveillance of its employees' union activities.

(e) Interrogating its employees concerning their union sympathies and activities.

(f) Prohibiting its employees from wearing and/or displaying union insignia while at work.

(g) Discharging, refusing to hire, refusing to consider for hire, or otherwise discriminating against any employee for supporting the above named union, or any other labor organization.

(h) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Reestablish and resume operations at, and out of, its Logansport and Fort Wayne, Indiana, offices, and on its various Indiana jobsites, as a mechanical and general contractor in the construction industry in a manner consistent with the level and manner of operation that existed on February 15, 1995, and offer reinstatement, employment and backpay to and, as applicable, consider for hire, employees harmed by its unlawful conduct, in the manner specified below:

(b) Within 14 days from the date of this Order, offer Steven Jacob full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(c) Make Jacob whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to Jacob's unlawful discharge, and within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

(e) Within 14 days of the date of this Order, or as soon as possible thereafter,<sup>142</sup> offer the following 23 discriminatees full reinstatement to its own direct employ in the jobs for which they have applied or, if those jobs no longer exist, to substantially equivalent positions:

Steven Baer

Daniel Krill

<sup>142</sup> Since DMC has not directly employed field workers in the mechanical trades since the beginning of 1998, a reasonable, but controlled, additional period beyond the standard 14 days might be necessary to enable that company to resume operations as a direct employer/contractor if DMC can satisfactorily justify the need for same during the compliance stage of this proceeding.

Chris Blaising

Phillip Davis

Bret Finch

Ronald Harding

Paul Herrman

Matthew Hickey

Edward Hinen

Patrick Hofman

James Kaylor

James Keplinger

Aaron Kerr

Leonard LaBundy

Todd Mikel

Kurt Prosser

James Radar

Jonathan Rekeweg

Fred Spade

John Stayanoff

Rogers Summers

Ted Zabel

Malcolm Zimmer, a.k.a

Randall Jackson

(f) Make the above named 23 discriminatees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(g) Consider the following discriminatees for hire to fill future job openings in accordance with nondiscriminatory criteria and notify such discriminatees, the above named Union and the Regional Director for Region 25 of future openings in positions for which the discriminatees applied, or of substantially equivalent positions:

Steven Baer

Daniel Krill

Jeffrey Jehl

Jerry Berghoff

Leonard LaBundy

Dennis Mulford

Chris Blaising

Todd Mikel

Mark Coil

Phillip Davis

Kurt Prosser

Pat Garrett

Bret Finch

James Radar

Jeffrey Ryan

Ronald Hardin

Jonathan Rekeweg

Douglas Jehl

Paul Herrman

Fred Spade

Elmer Young

Matthew Hickey

John Stayanoff

Ronald Woods

Edward Hinen

Rogers Summers

Scott Scovine

Patrick Hofman

Brad Yoder

James Kaylor

Ted Zabel

James Keplinger

Malcolm Zimmer, a.k.a Randall Jackson

Aaron Kerr

Merlin Rice

(h) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its offices in Logansport and Fort Wayne, Indiana, copies of the attached notice marked "Appendix A."<sup>143</sup> Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent DMC's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent DMC to ensure that the notices are not altered, defaced, or cov-

<sup>143</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ered by any other material. In the event that, during the pendency of these proceedings, the Respondent DMC has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent DMC at its Steel Dynamics, Inc., Guardian Glass, Silberline, Central Soya, Maple Leaf Duck Hatchery, Fasson and Bluffton Aggregates jobsites in the State of Indiana, at any time since February 15, 1995.

(j) Within 14 days after service by the Region, mail a copy of the attached notice marked "Appendix A"<sup>144</sup> to all mechanical trades employees who were employed by Respondent DMC at its above named jobsites in the State of Indiana at any time from the onset of the unfair labor practices found in this case, February 15, 1995, until the completion of these employees' work at those jobsites, including to employees jointly employed by Respondent DMC and/or Dilling Mechanical, Inc. (DMI), and Respondent Tradesmen International, Inc. (TI). The notice shall be mailed to the last known address of each of the employees after being signed by the Respondent's authorized representative.

(k) Within 21 days after service by the Region, file with the Regional Director for Region 25 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

B. Respondent, Tradesman International, Inc. (TI), Solon, Ohio, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Refusing to hire as employees on behalf of, or for work referral to, Dilling Mechanical Contractors, Inc., and/or Dilling Mechanical, Inc., persons who are members of or affiliated with the above named union, or any other labor organization.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative actions necessary to effectuate the policies of the Act.

(a) Assume the obligation of making the following 23 discriminatees whole, with interest, for any loss of pay they may have suffered because of TI's unlawful refusal/failure to hire them on behalf of, or for work referral to, Dilling Mechanical Contractors, Inc., and/or to Dilling Mechanical, Inc., should Dilling Mechanical Contractors, Inc., for reasons good and sufficient in law, fail to meet such obligation:

Steven Baer	Daniel Krill
Chris Blaising	Leonard LaBundy
Phillip Davis	Todd Mikel
Bret Finch	Kurt Prosser
Ronald Harding	James Radar
Paul Herrman	Jonathan Rekeweg
Matthew Hickey	Fred Spade
Edward Hinen	John Stayanoff

<sup>144</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Mailed by Order of the National Labor Relations Board" shall read "Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Patrick Hofman	Rogers Summers
James Kaylor	Ted Zabel
James Keplinger	Malcolm Zimmer
Aaron Kerr	

(b) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its Solon, Ohio, facility copies of the attached notice marked "Appendix B."<sup>145</sup> Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent TI's authorized representative, shall be posted by Respondent TI immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees jointly employed by Respondents TI and DMC/DMI<sup>146</sup> on DMC/DMI jobsites at any time since June 27, 1997.

(d) Within 14 days after service by the Region, mail a copy of the attached notice marked "Appendix B"<sup>147</sup> to all mechanical trades employees who were jointly employed by Respondents TI and DMC/DMI at DMC/DMI's various jobsites at any time from June 27, 1997, until the completion of these employees' work at those jobsites. The notice shall be mailed to the last known address of each of the employees after being signed by the Respondent TI's authorized representative.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 25 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

It Is Further Ordered that the consolidated complaints are dismissed insofar as they allege violations of the Act not specifically found.

Dated, Washington, D.C. August 21, 2000

<sup>145</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

<sup>146</sup> This remedial reference to DMC also applies to Dilling Mechanical, Inc. (DMI), after January 1, 1998, when it, too, became joint employer with TI on Dilling jobsites.

<sup>147</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Mailed by Order of the National Labor Relations Board" shall read "Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX A

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

## FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT discourage you from joining, supporting, or engaging in activities on behalf of Indiana State Pipe Trades Association, United Association of Plumbers and Pipefitters, AFL-CIO, and Plumbers and Steamfitters Local Union No. 166, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, collectively called the Union, or any other labor organization, by confiscating union literature.

WE WILL NOT threaten you with unspecified reprisals in the event that you engage in activities in support of the above named Union, or any other labor organization.

WE WILL NOT create impressions that we are spying on your union activities.

WE WILL NOT interrogate you concerning your union sympathies and activities.

WE WILL NOT prohibit you from wearing and/or displaying union insignia while at work.

WE WILL NOT discharge, refuse to hire, refuse to consider for hire, or otherwise discriminate against you, or any other employee, for supporting the above named Union, or any other labor organization.

WE WILL NOT In any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act.

WE WILL reestablish and resume operations at, and out of, our Logansport and Fort Wayne, Indiana, offices, and on our various Indiana jobsites, as a mechanical and general contractor in the construction industry in a manner consistent with the level and manner of operation that existed on February 15, 1995, and WE WILL offer reinstatement, employment and back-pay to and, as applicable, consider for hire, employees harmed by our unlawful conduct, in the manner specified below:

WE WILL within 14 days from the date of this Order, offer Steven Jacob full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Jacob whole, with interest, for any loss of earnings and other benefits suffered as a result of our discrimination against him.

WE WILL within 14 days from the date of this Order, remove from our files any reference to Jacob's unlawful discharge, and within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL within 14 days of the date of this Order, or as soon as possible thereafter, make to the following 23 discriminatees full offers of employment to work under own direct employ in the jobs for which they have applied or, if those jobs no longer exist, to substantially equivalent positions:

Steven Baer	Chris Blaising
Phillip Davis	Bret Finch
Ronald Harding	Paul Herrman
Matthew Hickey	Edward Hinen
Patrick Hofman	James Kaylor
James Keplinger	Aaron Kerr
Daniel Krill	Leonard Labundy
Todd Mikel	Kurt Prosser
James Radar	Jonathan Rekoweg
Fred Spade	John Stayanoff
Rogers Summers	Ted Zabel
Malcolm Zimmer	

WE WILL make the above named 23 discriminatees whole, with interest, for any loss of earnings and other benefits suffered as a result of our discrimination against them.

WE WILL consider the following discriminatees for hire to fill future job openings in accordance with nondiscriminatory criteria and notify such discriminatees, the above named labor organization and the Regional Director for Region 25 of future openings in positions for which the discriminatees applied, or of substantially equivalent positions:

Steve Baer	James Radar
Jerry Berghoff	Jonathan Rekoweg
Chris Blaising	Fred Spade
Phillip Davis	John Stayanoff
Bret Finch	Rogers Summers
Ronald Harding	Brad Yoder
Paul Herrman	Ted Zabel
Matthew Hickey	Malcolm Zimmer
Edward Hinen	Merlin Rice
Patrick Hofman	Dennis Mulford
James Kaylor	Mark Coil
James Keplinger	Pat Garrett
Aaron Kerr	Jeffrey Ryan
Dennis Krill	Elmer Young
Leonard Labundy	Ronald Woods
Todd Mikel	Scott Scovine
Kurt Prosser	

DILLING MECHANICAL CONTRACTORS, INC.

## APPENDIX B

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

**FEDERAL LAW GIVES YOU THE RIGHT TO**

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT refuse to hire as employees on our own behalf, or for work referral to, Dilling Mechanical Contractors, Inc., and/or Dilling Mechanical, Inc., persons who are members of or affiliated with Indiana State Pipe Trades Association, United Association of Plumbers and Pipefitters, AFL-CIO, and Plumbers and Steamfitters Local Union No. 166, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, collectively called the Union, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed to

you by Section 7 of the Act.

WE WILL assume the obligation of making the following 23 discriminatees whole, with interest, for any loss of pay they may have suffered because we refused to hire them on behalf of, or for work referral to, Dilling Mechanical Contractors, Inc., and/or to Dilling Mechanical, Inc., should Dilling Mechanical Contractors, Inc., for reasons good and sufficient in law, fail to meet such obligation:

Steven Baer	Daniel Krill
Chris Blaising	Leonard Kabundy
Phillip Davis	Todd Mikel
Bret Finch	Kurt Prosser
Ronald Harding	James Radar
Paul Herrman	Jonathan Rekeweg
Matthew Hickey	Fred Spade
Edward Hinen	John Stayanoff
Patrick Hofman	Rogers Summers
James Kaylor	Ted Zabel
James Keplinger	Malcolm Zimmer
Aaron Kerr	

TRADESMEN INTERNATIONAL, INC.